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A TREATISE

ON

THE AMERICAN LAW

OF

REAL PROPERTY

BY

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SIXTH EDITION

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LAW OF REAL PROPERTY.

CHAPTER LXXXV.

TITLE BY DESCENT.

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§ 1822. **Title defined.** — Title is the means whereby an estate in real property is acquired. Lord Coke defines it as "*justa causa possidendi quod nostrum est*, and signifieth the means whereby a man cometh to land. *Et dicitur titulus a tuendo*, because by it he holdeth and defendeth the land." [1]

§ 1823. **The Different Stages of Title.** — Blackstone divides title to lands, considered in its progressive development, into several stages; namely, naked possession, right of possession, right of property without possession, and right of property united with the right of possession.[2] This idea of Judge Blackstone, which has been adopted by Mr. Cruise and other writers, is illustrated by an act of disseisin, followed by possession by the disseisor. If a disseisor enters upon the land of another, and evicts or turns the true owner out of possession thereof, although in one sense, as between him and the true owner, he has no right or title whatever to the land, yet, as to all the world but him, the possession so gained gives him complete dominion over and right to the land, and constitutes, in the eye of the law, a *prima facie* title thereto. In the mean time, however, the one who has been wrongfully evicted has a right to the possession which the disseisor has usurped and retains, so that here is a naked possession in one, and a right to the immediate possession in another. In every State, where the common law prevails, possession of lands, for a period of time sufficiently long, is held to divest the owner thereof of his right to regain his possession by his own act, without the aid of legal process. If, therefore, in the case supposed, this possession shall have been continued by the disseisor for the requisite length of time, nothing will remain in the original owner but a right of property, while the possession, and right

[1] Co. Lit. 345 *b*.

[2] 2 Bl. Com. 195–199.

of possession, will have become united in the disseisor. It only remains, then, for the right of property to become united with the possession, and right of possession, to perfect the disseisor's title. And here again, for the sake of quieting titles, there is, in every State, a period beyond which no man may enforce his naked right of property, after he shall have lost his right of possession; and if, in the case supposed, he suffers the disseisor to retain the possession beyond this prescribed period of time, no one can call in question the right of property as well as of possession of the latter, and he thereby becomes clothed with a complete title to the land.[1] "It would seem, that the perfection of title consists in the union of possession with the right of possession; for when these meet in the same person, he cannot be rightfully dispossessed. In other words, he is the lawful owner of the property.[2]

§ 1824. **All Title by Descent or Purchase.** — In one thing all writers agree, and that is in considering that there are two modes only, regarded as classes, of acquiring a title to land; namely, descent and purchase; purchase including every mode of acquisition known to the law, except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by the act of the law.[3]

§ 1825. **Definition of Title by Descent.** — "Property of lands by descent is," says Lord Bacon, "where a man hath lands of inheritance, and dieth, not disposing of them, but leaving it to go (as the law casteth it) upon the heir. This is called a descent of law."[4]

§ 1826. **Heir always created by Law.** — The *heir*, as the term is here used, is always appointed by the law; for all persons appointed by a tenant in fee-simple as his successors are technically not heirs, but assigns, whether the appointment be by deed or by will.[5]

§ 1827. **No Heir until Ancestor's death.** — The title of an heir

[1] 2 Bl. Com. 195–199; Co. Lit. 266 *a*; 3 Cruise, Dig. 312–315; 4 Kent, Com. 373; Güterbock, Bracton by Coxe, 100; Reeves' Hist. (4th ed.) 234.

[2] Walk. Am. Law, 317.

[3] 2 Bl. Com. 241; James *v.* Morey, 2 Cow. 290; Co. Lit. 18 *b*.

[4] Bac. Law Tracts, 128.

[5] Co. Lit. 191 *a*, note 77.

is called into existence by the *death* of the ancestor, for *nemo est hæres viventis;* although, in popular phrase, certain persons are regarded as the heirs of persons still alive, under the names of heirs apparent and heirs presumptive.

§ 1828. **Heirs apparent and presumptive.** — Thus, an heir presumptive is a person who, if the ancestor were then to die, would be his heir; as, for instance, in England, a daughter, if an only child, would be heir presumptive of her father; but if he were subsequently to have a son, she would cease to be such heir. An heir apparent is one who is certain to be heir of an ancestor if he survive him, as is the case in England with the oldest son; since, by the canons of descent there, he is sure to be his father's heir if he outlive him.[1]

§ 1829. **Heir's Title independent of his own Act.** — An heir at law is the only person who, by the common law, becomes the owner of land without his own agency or assent. A title by deed or devise requires the assent of the grantee or devisee before it can take effect. But in the case of descent, the law casts the title upon the heir, without any regard to his wishes or election. He cannot disclaim it if he would.[2] Where an heir takes undevised property, he never takes it by act or intention of the testator. His right is paramount to and independent of the will.[3] An heir is entitled to rents of undevised lands until sold for the payment of debts, even though the ancestor die insolvent.[4] And where a railroad was laid across the land of an ancestor after his decease, his heir was held entitled to the damages, though the land was subsequently sold for payment of debts.[5]

§ 1830. **Origin of Primogeniture.** — In tracing the history of the law of descent of lands in a former part of this work,[6] it was stated that "children, at first, succeeded to a fund in the place of the father, and grandchildren in the place of children." In a treatise called "The Laws of Henry I.," the

[1] 2 Bl. Com. 208.

[2] Wms. Real Prop. 75; 2 Bl. Com. 201.

[3] Augustus *v.* Seabolt, 3 Met. (Ky.) 161.

[4] Lobdell *v.* Hayes, 12 Gray, 238; Gibson *v.* Farley, 16 Mass. 280; Newcomb *v.* Stebbins, 9 Met. 540; Kimball *v.* Sumner, 62 Me. 305.

[5] Boynton *v.* Peterborough & S. R. R. Co., 4 Cush. 467.

[6] *Ante*, § 176.

doctrine of excluding females is promulgated ; and it is declared that the capital fief should go to the oldest son. And this is said to have been the first notice of the English doctrine of primogeniture in the law of descent.[1] The rest of the ancestor's lands were to the younger son or sons.[2]

§ 1831. **Changes in the English Law of Descents.** — In the time of Henry II., however, the oldest son had become sole heir to all lands held by military tenure ; nor could his right be defeated by an alienation of the ancestor, though socage lands, unless there was some custom to the contrary, descended to sons equally. If the ancestor left no sons, both military and socage lands descended to daughters in equal shares, the oldest having the capital messuage, upon making compensation to the other daughters, but all taking as coparceners.[3]

§ 1832. **Final Crystallization of the Law.** — In the time of Henry III., or soon after, both socage and military lands descended according to the rules of *primogeniture*.[4] But it is not known when collaterals first took in succession, though the usage prevailed in the time of Henry II., that brothers and sisters should take if there were no lineal descendants ; or, if they were dead, their children were to take in their stead. After these, the uncles and their children came in ; and, last, aunts and their children ; the males always being preferred to females.[5] The approach to this system of rules, however, was gradual and by degrees only, though it is difficult to trace the stages of the progress.[6] In the time of Henry III., the rule *jus descendit ad primogenitum* was established, and all descendants, *in infinitum*, from any person who would have been heir if living, inherited *jure representationis*. Thus the oldest son dying in the lifetime of the father, and leaving issue, that issue was to be preferred in inheritancy to the grandfather before any younger brother of the father.[7] The

[1] 1 Spence, Eq. Jur. 175.

[2] Reeve, Hist. Eng. Law, 30 (1st ed.).

[3] Reeve, Hist. Eng. Law, 30 ; 1 Spence, Eq. Jur. 176 ; Dalrymp. Feud. Ten. 205.

[4] 1 Spence, Eq. Jur. 176.

[5] Reeve, Hist. Eng. Law, 32.

[6] Dalrymp. Feud. Ten. 216–221.

[7] Reeve, Hist. Eng. Law, 227 ; Bract. Lib. 2, pp. 64, 65.

father, it will be perceived, or any lineal ancestor, was never allowed to succeed as heir to a descendant, or, as Bracton says, "*nunquam reascendit ea via qua descendit, post mortem antecessorum.*" [1]

§ 1833. **Hale's Canons of Descent.** — Lord C. J. Hale is said to have reduced the rules of descent to a series of canons, although these rules had then been in use for four hundred years; and no change was made in them until the act of 3 & 4 Wm. IV. c. 106, in 1833.[2]

§ 1834. **Feudal Rules of Descent never adopted here.** — It will be found that the system of rules developed under the feudal notions of the middle ages, though maintained for so many ages in the mother-country, were not in accordance with the genius and condition of her Colonies in this country; and that, at an early period in their history, important departures from these canons were made in the progress of their legislation. When these Colonies became States, each had its own system of rules for the government of property within its limits, some of them varying essentially from those of the others, and all from the English common law. And these changes were followed in the end by that of England, in 1833, already mentioned, which introduced material modifications in the ancient canons, and rendered the system in many particulars more conformable to the prevailing spirit of legislation upon the subject in this country. A statement of the early canons of the English law of descent is necessary, however, in order to understand the propositions and illustrations made by legal writers, and to appreciate the changes resulting from recent legislation both in England and in this country. This statement, however, must be prefaced by certain universal rules of construction, all originating in the common law and all applying to the various systems now existing.

§ 1835. **Consanguinity**, or kindred by blood relationship, is the connection or relation of persons descended from the same stock or common ancestor. This common ancestor, to whom reference is made in computing the degrees of affinity to determine the nearness or remoteness of relationship of differ-

[1] 2 Bl. Com. 211; Bract. Lib. 2, p. 62.

[2] Wms. Real Prop. 76.

ent persons akin to each other, is commonly spoken of as the *stirps* or *root*, sometimes the *stipes*, the trunk or common stock from which the line or lines of descent are traced. This consanguinity is either lineal or collateral. It is lineal when it exists between persons descended in a direct line one from the other, as father, grandfather, and the like, in an ascending line, and son, grandson, and the like, in the descending line. It is collateral when they are descended from a common *stirps*, or stock, but not one from the other. Thus a man and his nephew are collaterally related, as each may trace his line of descent to the same common ancestor, the father of the one being also grandfather of the other.[1]

§ 1836. **Degrees of Kindred, how computed.** — By the canon and common law, which concur in this respect, the degrees of kindred between two persons are reckoned by counting from a common ancestor to the most remote descendant of the two from him. The relation of two brothers is in the first degree, because there is but one step from their father to either of them. But the relation of uncle and nephew is in the second degree; there being two degrees from the nephew to his grandfather, the father of the uncle. By the civil law, which is, in this respect, generally adopted in this country,[2] these degrees are computed by adding together the number of degrees there are between each of the two persons whose relationship is to be ascertained and the common ancestor. Thus the relation between brothers is in the second degree, each being one degree removed from the father; but between uncle and nephew it is the third, and between cousins the fourth, degree of kindred.[3]

§ 1837. **The first of the English Canons of Descent** was, that the inheritance should lineally descend to the issue of the person who *last died actually seised*, *in infinitum*, but never lineally ascend. The seisin here meant must have been an actual, or what was equivalent to an actual, corporal seisin.[4] The English law is now so changed, that the heir must be of the last person entitled to the estate as a purchaser. So

[1] 2 Bl. Com. 202, 206.

[2] McDowell *v.* Addams, 45 Penn. St. 430.

[3] 2 Bl. Com. 206, 207; Decoster *v.* Wing, 76 Me. 450.

[4] 2 Bl. Com. 208, 209.

that, if one has an estate as heir from one who purchased it, and dies, his heir does not inherit the estate unless he is also heir to the purchaser from whom his immediate ancestor inherited.[1] If there is a failure of lineal descendants of the last purchaser entitled to the estate, it goes to the nearest lineal ancestor, the father, and all paternal ancestors and their descendants being preferred before females.[2]

§ 1838. **The second Canon** is still the English law, that male issue are admitted as heirs before females.[3]

§ 1839. **The third Canon** provides, that where there are several male kindred in equal degree, the oldest is the heir. But if there are several females, they all, together, constitute what is called the *heir;* and this rule remains unchanged.[4]

§ 1840. **The fourth Canon** is that the lineal descendants *in infinitum* of any person deceased represent the ancestor; that is, stand in the same place as the ancestor would himself have done had he been living. This taking by representation is called a succession *per stirpes*, or according to the roots; all the branches of each root taking the share which the root it represents would have taken, and is used in distinction from taking *per capita*, where each takes as next of kin to the deceased in his own direct right.[5]

§ 1841. **Fifth Canon.** — Upon failure of lineal descendants or issue of the person last seised, the inheritance descends to his collateral relations of the blood of the first purchaser, subject to the last three previous rules. This is now altered so that the estate passes to lineal ancestors, if any, in preference to collateral kindred.[6]

§ 1842. **Sixth Canon.** — The heir in the collateral line of the person last seised must be his next collateral kinsman of the whole blood. By kinsman of the whole blood is meant one who has descended not only from the same ancestor, but from

[1] Wms. Real Prop. 78–80.

[2] Wms. Real Prop. 83, 85. Mr. Coleridge, in his note to 2 Bl. Com. 211, says, in the case above supposed, "The inheritance is equally divided between the two ascending lines."

[3] 2 Bl. Com. 213.

[4] 2 Bl. Com. 214.

[5] 2 Bl. Com. 217, 218.

[6] 2 Bl. Com. 220; Wms. Real Prop. 83.

the same couple of ancestors. If two are descended from the same father, but have different mothers, or from the same mother by different fathers, they will be as of the half blood to each other. And by the application of this canon, a sister of the whole blood of one who is deceased is preferred to a brother of the half blood, under the maxim that *possessio fratris facit sororem esse hæredem.*[1] This canon is now altered so that a kinsman of half blood is made capable of being heir, and to inherit next after a kinsman in the same degree, of the whole blood.[2]

§ 1843. **The seventh Canon** respects collateral inheritances, and prefers male stocks to female, unless the lands shall have actually descended from the female. This means, that kindred derived from the blood of the male ancestor, however remote, shall be admitted before those from the blood of the female, however near, with the exception above stated; the relations on the father's side being admitted, *in infinitum*, before those of the mother's side are admitted at all.[3]

§ 1844. **What is accounted as "Land."** — The word *land*, as used in the present English statute of descent to denote that to which a person must be entitled in order to be a purchaser, and therefore an ancestor from whom a descent might be traced, embraces all estates, possibilities, rights, titles, and interests in all lands, whether in possession, reversion, remainder, or contingency. Nor is it necessary, in order to make one entitled to land, that he should have obtained possession, or the rents and profits thereof.[4]

§ 1845. **Of the Seisin of the Stirps.** — By the English law, no one could be a *stirps* from whom a descent could be derived, unless he had been actually seised. The possession of a tenant for years was, however, deemed to be the possession of him who was entitled to the freehold, whether a reversioner or a remainder-man.[5] And the seisin or possession of one tenant in common or coparcener is a seisin or possession of all.[6]

§ 1846. **Of the Seisin of Reversions, etc., at Common Law.** — As there can be no actual seisin and possession of a remainder or reversion dependent upon a particular estate of freehold,

[1] 2 Bl. Com. 224, 227.
[2] Wms. Real Prop. 86.
[3] 2 Bl. Com. 234.
[4] Burt. Real Prop. § 301, note.
[5] Co. Lit. 15 *a*.
[6] 4 Kent, Com. 386.

although the same will descend through a line of successive heirs until the estate vests in some one in possession, the rule of the common law seems to be this: If such remainder or reversion comes by descent from the donor of the particular estate who created the same, the person who claims it when it vests in possession must trace his descent from the donor who was last actually seised, irrespective of all who, in the mean time, may have been entitled to the same as heirs; the donor or creator of the particular estate being the *stirps* from which the descent of the one who is to take is to be traced. But it would have been competent for any one to whom such right had descended to have sold or devised it, whereby the grantee or devisee as purchaser would have constituted a new *stirps*, and he would take the estate when it vested in possession who could trace the descent to himself from such new *stirps*. And the same would be the effect if the donor of the particular estate, or the remainder-man subject to it, had himself conveyed or devised the reversion or remainder.[1]

§ 1847. **American Law respecting Reversions, etc.** — But the law, in this respect, is changed in several if not all of the United States, and the heirs of a reversioner or remainder-man take as absolutely as if their ancestor were actually seised as of a freehold in possession; the word "seised," when applied to such an interest, being equivalent to owning, and "seisin" to ownership. A remainder-man or reversioner, therefore, becomes a proper stock of descent, and the remainder or reversion of one dying intestate is to be distributed among his heirs in the same manner as estates in possession. The heir here takes all the real estate *owned* by the ancestor at the time of his death; and the maxim of the common law, that *seisina facit stipitem, non jus*, is practically abolished, it is believed, in many if not in all the States in this country.[2]

[1] Cook *v.* Hammond, 4 Mason, C. C. 484; Miller *v.* Miller, 10 Met. 393; 4 Kent, Com. 385; Vanderheyden *v.* Crandall, 2 Denio, 9; 4 Kent, Com. 386, 387; *ante*, §§ 1514, 1515.

[2] Cook *v.* Hammond, 4 Mason, C. C. 484; Miller *v.* Miller, 10 Met. 393, 401; Russell *v.* Hoar, 3 Met. 187; Whitney *v.* Whitney, 14 Mass. 88; Vanderheyden *v.* Crandall, 2 Denio, 9; Moore *v.* Rake, 26 N. J. 574; Hillhouse *v.* Chester, 3 Day, 166; 4 Kent, Com. 388; Walk. Am. Law, 333; Hartley *v.* State, 3 Ga. 238. But see Chirac *v.* Reinecker, 2 Pet. 625, as to the law of Maryland. See also Lawrence *v.* Pitt, 1 Jones (N. C.), 344. See statutes at the end of this chapter.

§ 1848. **Of the Half Blood in the United States.** — While, as will be seen in the note at the end of this chapter, the laws of the various States are not uniform as to the rights of kindred of the half blood to inherit, nevertheless, the distinction in this country between the whole and the half blood no longer exists unless it is retained by a fair construction of the statute.[1]

§ 1849. **Ancestral Inheritances** are those which came to the ancestor by descent, these being distinguished from those acquired by him by purchase. In some States, it will be found that these descend to the kindred who are of the blood of the ancestor from whom the inheritance comes, whether in the paternal or maternal line, excluding the relations on the opposite side until the first shall have been exhausted. And in tracing out this ancestral line, it always stops at the first purchaser. When reference is made, in the language of a statute, regulating descent to such as are of the blood of the person from whom the estate came, a father is accounted to be of the blood of his daughter.[2]

§ 1850. **Posthumous Children** inherit in the same manner as if they had been born in the lifetime of the father, and were surviving heirs; and this doctrine is universally adopted in the United States.[3] And this relates back to the conception of the child, if it is born alive.[4]

§ 1851. **Illegitimate Children as Heirs.** — By the common law, illegitimate children can neither be heirs to any one, nor ancestors to any one, except their own issue, for purposes of descent. But the laws of many of the States will be found to have modified this rule, especially as between mothers and their illegitimate children.[5] [But a statute making bastards capable of inheriting and transmitting inheritance on the part

[1] Anderson *v.* Bell, 140 Ind. 375; s. c. 39 N. E. Rep. 735; s. c. 29 L. R. A. 541, where will also be found a valuable note covering the entire subject.

[2] Cole *v.* Batley, 2 Curt. C. C. 562.

[3] 4 Kent, Com. 412; Den d. Watkins *v.* Flora, 8 Ired. 374; Morrow *v.* Scott, 7 Ga. 535. See note at the end of this chapter.

[4] Harper *v.* Archer, 4 Sm. & M. 99.

[5] In Connecticut, there is no statute on this subject, but a bastard inherits from his mother, by judicial decision. Dickenson's App., 42 Conn. 491. A bastard cannot inherit from his mother's ancestors, under a statute allowing bastards to inherit and transmit an inheritance on the part of or to the mother. Jackson *v.* Jackson, 78 Ky. 380. See note at the end of this chapter.

of the mother does not render them capable of tracing inheritance from her kindred through her.[1] Conversely, if the mother be allowed to inherit from her illegitimate child, her kindred could not trace inheritance through her.[2]]

§ 1852. **What Law regulates Descents.** — The *lex loci rei sitæ* regulates the descent of lands, irrespective of the domicil of the person of the intestate, or the claimants as heirs.[3] And those laws must be the same which are in force at the death of the ancestor, the rights of heirs being considered as arising at that time.[4]

§ 1853. **Of Descent from Aliens.** — Where an alien is, by law, authorized to hold real estate, it will descend as that of a citizen to whoever is his lawful heir, if he has any, and will not escheat; and where one was authorized by special statute to hold lands, and he died intestate, leaving a father an alien, a brother authorized to hold land, and other brothers aliens, it was held, that his estate descended directly to his brother, who had capacity to take lands, as his heir.[5]

§ 1854. **When a Child is Heir in Place of the Father.** — In some of the United States, the issue of a deceased child take the share of their parent, in the estate of the parent of their parent. But in these cases it is necessary that the child, their parent, should have died in the lifetime of their grandparent, in order to have his issue become heirs of their grandparent by way of representation. Where, therefore, there was a devise of an estate first to A B for life, who was a son and one of the heirs of the testator, remainder to the legal heirs of the testator, it was held that, if the remainder was a vested one, A B might convey his share of it in his lifetime, and so cut off his heirs from any part of it. If the remainder did not vest till the decease of A B, still his children could not take as

[1] Williams *v.* Kimball, 35 Fla. 49; s. c. 26 L. R. A. 746; s. c. 16 So. Rep. 783.

[2] Croan *v.* Phelps, 94 Ky. 213; s. c. 23 L. R. A. 753; s. c. 21 S. W. Rep. 874; Murphy *v.* Portrum, 95 Tenn. 605; s. c. 32 S. W. Rep. 633.

[3] Story, Confl. Laws, § 484; Potter *v.* Titcomb, 22 Me. 300; Jones *v.* Marable, 6 Humph. 116; Smith *v.* Kelly, 23 Miss. 167; Donovan *v.* Pitcher, 53 Ala. 411; Grimball *v.* Patton, 70 Ala. 626; Pratt *v.* Douglas, 38 N. J. Eq. 516; Robertson *v.* Pickrell, 109 U. S. 608.

[4] Marshall *v.* King, 24 Miss. 85; McGaughey *v.* Henry, 15 B. Mon. 383; Miller *v.* Miller, 10 Met. 393, 401.

[5] Parish *v.* Ward, 28 Barb. 328. And see *ante*, § 132.

heirs of the testator; for to constitute them such heirs, their father, A B, must have died in the testator's lifetime; and in this case they were not born till after the testator's death, by which, of course, the father must have survived the testator.[1]

§ 1855. **Of disinheriting the Heir.** — An heir at law cannot be disinherited except by express devise, or a necessary implication in a will. No wish, however strong, expressed in a will that the heir should not inherit, will have any effect, unless the testator actually devise the same estate to some other person.[2]

§ 1856. **Title by Descent preferred to that by Devise.** — And, independent of legislation, as a title by descent is deemed by law to be worthier than that by devise, if an ancestor devises to his heir just the estate in quantity and quality which he would take by descent, the latter will be considered as holding by descent, and not by devise.[3] But if one devises an estate to his wife, she will take as a purchaser, and not by descent.[4]

§ 1857. **Title of Ancestor vests at once in Heir.** — Upon the death of an ancestor, the real property he may leave undevised vests at once in his heir, subject to be divested if required for the payment of the intestate's debts.[5] And if the estate of the deceased was a fee, the law presumes that it descended to the heirs at law of the deceased, unless a devise thereof is affirmatively shown.[6] And in trying the title of an heir, it is not necessary for him to show that his ancestor died intestate. The intestacy is presumed till the contrary is proved.[7]

§ 1858. **Murder of Ancestor — Corruption of Blood.** — [Upon the ground that no one should be allowed to take advantage of his own wrong, it has been held that one killing his ancestor for an estate which would naturally come to him under the

[1] Brown *v.* Lawrence, 3 Cush. 390–399.

[2] Doe d. Clendenning *v.* Lanius, 3 Ind. 441; McIntire *v.* Cross, id. 444.

[3] Gilpin *v.* Hollingsworth, 3 Md. 190; Philips *v.* Dashiell, 1 Har. & J. 478; Hoover *v.* Gregory, 10 Yerg. 444; Buckley *v.* Buckley, 11 Barb. 43; Ellis *v.* Page, 7 Cush. 161; Posey *v.* Budd, 21 Md. 480; Stilwell *v.* Knapper, 69 Md. 558. The law is altered in England in this respect by the statute 3 & 4 Wm. IV. c. 106, § 3.

[4] Culbertson *v.* Duly, 7 Watts & S. 195.

[5] Chubb *v.* Johnson, 11 Tex. 469; Wilson *v.* Wilson, 13 Barb. 252.

[6] Baxter *v.* Bradbury, 20 Me. 260.

[7] Lyon *v.* Kain, 36 Ill. 368.

statute of descents, cannot inherit.[1] But this is not the prevailing American doctrine; and, under such circumstances, the murderer would inherit, unless expressly forbidden by the statute of descents.[2]]

§ 1859. **How to prove Collateral Heirship.** — To prove heirship in a collateral line, a party must show the descent of himself and of the person last seised from some common ancestor, and the exhaustion of all the lines of descent which would have a right to claim before him.[3]

§ 1860. **"Ancestor" defined.** — The term "ancestor," as used in a statute of descents, means any one from whom the estate is inherited. In this sense an infant brother may be the ancestor of an adult brother, the former having died, and his estate having come to the latter as his heir.[4]

§ 1861. **Husband and Wife**, for purposes of inheritance, do not constitute one person in law.[5]

§ 1862. **Effect of omitting Child's Name from Will.** — It sometimes happens that a testator, by accident or intention, omits the name of a child or grandchild in the provisions of his will; and questions arise as to what are the rights of such child or grandchild in respect to the testator's property. It seems to depend entirely upon the intention of the devisor, the child being without remedy if his parent or grandparent deliberately determines to disinherit him. But if the child or grandchild is not named in the will, the law will presume it is an accidental omission, and therefore lets him in to claim the share of the estate of the testator to which he would have been entitled had he died intestate. This, of course, applies only to grandchildren where the child is dead, and they come in in his place.[6] And, in Massachusetts, this was held to extend to children born after the making of the will.[7] What shall be

[1] Riggs *v.* Palmer, 115 N. Y. 506; s. c. 5 L. R. A. 340; s. c. 22 N. E. Rep. 188.

[2] Carpenter's Appeal, 170 Penn. St. 203; s. c. 29 L. R. A. 145; s. c. 32 Atl. Rep. 608; Owens *v.* Owens, 100 N. C. 240; s. c. 6 S. E. Rep. 794; Deem *v.* Milliken, 6 Ohio C. Ct. Rep. 357; Shellenberger *v.* Ransom, 41 Neb. 631; s. c. 25 L. R. A. 564; s. c. 59 N. W. Rep. 935.

[3] Emerson *v.* White, 29 N. H. 482.

[4] Prickett *v.* Parker, 3 Ohio St. 394; Wheeler *v.* Clutterbuck, 52 N. Y. 70.

[5] Knapp *v.* Windsor, 6 Cush. 156.

[6] Gage *v.* Gage, 29 N. H. 533.

[7] Bancroft *v.* Ives, 3 Gray, 367.

considered such an omission of the child as to allow him to come in as heir, depends, of course, upon the construction of the will showing that the testator did or did not have the child in view in making the devises in his will. Thus, where the testator left the disposal of his property "as well with reference to our child or children as A B," it was held to be such a reference to a child as not to leave the estate intestate as to him.[1]

§ 1863. **Marshalling Assets in paying Ancestor's Debts.** — It has already been stated that every heir takes his land by descent, subject to the debts of the intestate, provided it be necessary for that purpose, and the requisite proceedings are had within the period of limitation within which lands, in the hands of heirs, are, by statute, made liable for such debts. And in order to determine the respective rights and liabilities, in this respect, of persons inheriting portions of an intestate's estate, there are rules in several of the States for "marshalling the assets," as it is called, or determining the order in which the estate, real and personal, shall be applied in the payment of the intestate's debts.[2]

§ 1864. **Inheritable Interests.** — It is not always easy to determine whether claims to or interests in lands are or are not inheritable, and pass by descent. Among some of these which have come under the consideration of courts are the claims to lands which had been "located" under the laws respecting public lands, and surveyed, but not actually patented, by the ancestor during his life. In one case, the patent issued to the heirs after the ancestor's death; and it was held that they took by descent, and not as purchasers.[3] So where A devised lands to B, upon a condition subsequent, and made C his residuary devisee, C died, and then B committed a breach of the condition under which he held his estate; and it was held, that the possibility of regaining the estate by making an entry for condition broken, which passed to C by the devise, descended to his heirs at his death.[4] Where lands were sold

[1] Beck *v.* Metz, 25 Mo. 70.

[2] See Hayes *v.* Jackson, 6 Mass. 149.

[3] Bond *v.* Swearingen, 1 Ohio, 395; Frizzle *v.* Veach, 1 Dana, 211; Shanks *v.* Lucas, 4 Blackf. 476.

[4] Clapp *v.* Stoughton, 10 Pick. 463.

for taxes, but the purchaser died before a deed had been delivered, although a certificate of sale had been delivered to him, it was held that the interest in the lands descended to his heirs.[1] Where the owner of the land leased it in fee, reserving rent, and died, it was held, that rents accruing due after the death of the lessor descend and pass to his heirs, as a part of his inheritance.[2]

§ 1865. **Advancements.** — In distributing estates among heirs and distributees of intestates, a principle is adopted in most, and it is believed all, the States, whereby, if any heir or distributee has received any part of his share of his father's estate during his lifetime, the same will be deducted from his share of what the intestate shall have left at his death, provided such share shall exceed the amount in value which he shall have received in the lifetime of his father. The sum thus advanced is called an *advancement*, and may consist of real and personal estate. But in order to its being allowed in estimating the several shares to be received by the heirs or distributees, it must be shown to have been intended as an advancement, by certain forms of proof which the law has prescribed. These rules of evidence are not uniform, each State generally prescribing its own rules by statute[3] (see note *infra*).

NOTE.

STATUTE RULES OF DESCENT.

The rules of descent, prescribed by the statutes of the several United States, are as follows (for capacity of aliens, see note, *ante*, § 132) : —

In *Alabama*, the real estate of an intestate descends, —

I. To the children and their descendants *per stirpes* equally.

II. To the brothers and sisters, or their descendants.

III. If none of these, to the father, if living; if not, to the mother.

IV. If there be neither of these, then to the next of kin in equal degree.

V. If there be none of the above-mentioned kindred, then to the husband or wife; and in default of these, it escheats to the State.

VI. There is no representation among collaterals except with the descendants of brothers and sisters of the intestate.

VII. There is no distinction between the whole and half blood, except that, in

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[1] Rice *v.* White, 8 Ohio, 216.

[2] Green *v.* Massie, 13 Ill. 363; Haslage *v.* Krugh, 25 Penn. St. 97.

[3] 4 Kent, Com. 418, 419.

case the inheritance was ancestral, those not of the blood of the ancestor are excluded as against those of the same degree. The rules of the civil law are observed in computing the degrees.

VIII. Posthumous children inherit as if born in the intestate's lifetime; but no right of inheritance accrues to any other person than the children of the intestate unless born at his death.

IX. Bastards inherit from the mother as if born in lawful wedlock; and the mother or kindred of an illegitimate child on the part of the mother are, in default of children of such illegitimate child, or their descendants, entitled to inherit his estate.

X. Any estate, real or personal, which has been given by any intestate in his lifetime, as an advancement to any child or other lineal descendant, must be considered as a part of the estate so far as regards the division and distribution thereof, and must be taken by such child or descendant toward his share of the estate of the deceased. In no case is he compelled to refund any part of an advancement. When such advancement is made in real estate it is to be considered part of the real estate to be divided; when in personal estate, as part of the personal estate. If in either case it exceeds his share of the real or personal, he receives so much less of the other as will make his whole share equal. The value of the advancement is to be taken as expressed in the conveyance or charge thereof by the intestate, or in the receipt given by the person receiving the advancement; failing such expression it is estimated according to its value when given. Code, 1896, § 1453 *et seq.*

In *Alaska*, the laws of descent are the same as existed in the State of Oregon on May 17, 1884; 23 U. S. Stat. at Large, c. 53, § 7. The statute in force in Oregon was the act of Oct. 24, 1864, which still remains. See *infra*, Oregon.

In *Arizona*, if there be no surviving husband or wife, the descent is to the male and female kindred in parcenary.

I. To decedent's children and their descendants.

II. To father and mother equally.

III. One half to father or mother, and the other to decedent's brothers and sisters and their descendants.

IV. To father or mother.

V. To decedent's brothers and sisters or their descendants.

VI. Half to the paternal and half to the maternal kindred, as follows: —

1. To grandfather and grandmother equally.

2. One half to grandfather or grandmother and the other to the descendants of the deceased grandfather or grandmother.

3. To grandfather or grandmother.

4. To descendants of grandfather and grandmother, and so on without end, passing in like manner to the nearest lineal ancestors and their descendants.

When decedent leaves husband or wife surviving, —

VII. One third to surviving husband or wife, for life, remainder to deceased's child or children and their descendants.

VIII. One half to surviving husband or wife in fee, the other half according to rules of descent, provided that if deceased have neither father nor mother surviving, then the whole goes to surviving husband or wife.

IX. Ancestral property is not recognized, except that if the intestate was the legally adopted heir of another and leave no husband, wife, or children, the property

derived by gift, devise, or descent from the person who adopted him shall descend to the heirs of such person.

X. Collaterals of the half blood take half portions when they share with the whole blood; otherwise whole portions.

XI. Only children or lineal descendants of the intestate can inherit unless they are in being and capable in law to take as heirs at the time of the death of the intestate.

XII. Children or their issue must bring advancements into hotchpot, being accountable for the value of the property at the time it was advanced.

XIII. All heirs in the same degree take *per capita;* but where some of those in the same degree are dead and their issue are entitled to partition, such issue will take *per stirpes.*

XIV. Illegitimate children are legitimated by the marriage of the parents and recognition by the father.

XV. Bastards inherit from and through their mothers. R. S. 1887, § 1459 *et seq.*

In *Arkansas,* real estate of inheritance descends —

I. To the children or their descendants in equal parts.

II. To the father, then to the mother.

III. To the brothers and sisters, or their descendants.

IV. To the grandfather, grandmother, uncles, and aunts, and their descendants, in equal parts; and so on, passing to the nearest lineal ancestor and his descendants.

V. If there be no such kindred, then to the husband or wife; and in default of these, it escheats to the State.

VI. The descendants of the intestate, in all cases, take by right of representation, where they are in different degrees, but *per capita,* if in equal degrees.

VII. If the estate come from the father, and the intestate die without descendants, it goes to the father and his heirs; and if the estate be maternal, then to the mother and her heirs. But if the estate be an acquired one, it goes to the father for life; and in default of father, or at the end of his life-estate, then to mother for life.

VIII. In default of father and mother, or at the end of their life-estates, then first to the brothers and sisters and their descendants of the father; then to those of the mother. This applies only where there is no nearer kindred, lineal or collateral.

IX. The half blood inherits equally with the whole blood in the same degree; but if the estate be ancestral, it goes to those of the blood of the ancestor from whom it was derived.

X. In all cases not provided for by the statute, the inheritance descends according to the course of the common law.

XI. Posthumous children inherit, but no others can inherit unless they were born at the time of intestate's death.

XII. Illegitimate children inherit and transmit inheritance on the part of the mother.

XIII. Bastards are legitimated by marriage of the parents and recognition by the father.

XIV. The issue of marriages deemed null in law are legitimate.

XV. The law as to advancements is the same as in Alabama, *q. v.*

XVI. A person may make any one his heir at law by a written declaration, acknowledged and recorded. Sanders & Hill's Dig. 1894, § 2470 *et seq.*

In *California*, —

I. If there be a surviving husband or wife, and only one child, or the issue of one child, in equal shares to the surviving husband or wife, and child, or issue of such child. If there be more than one child, or one and the issue of one or more, then one third to the surviving husband or wife, and the remainder to the children or issue of such by right of representation. If there be no child living, then to lineal descendants equally, if they are in the same degree; otherwise by right of representation. If there is no surviving husband or wife, but issue, the whole goes to the issue *per stirpes*.

II. If no issue survive, one half to surviving husband or wife, the other half to decedent's father and mother in equal shares, and if either be dead the whole of said half goes to the survivor. If no father or mother, one-half goes in equal shares to the brothers and sisters of decedent or their issue *per stirpes*. If no issue, husband, or wife, the estate goes to the father and mother in equal shares, or if one be dead, to the other.

III. If there be neither issue, husband, wife, father, nor mother, then to the brothers and sisters and their issue by right of representation.

IV. If husband or wife survive, but none of the other foregoing relatives, the whole goes to the surviving husband or wife.

V. If none of the foregoing relatives survive, to the next of kin in equal degrees, except that if collaterals claim through different ancestors, those claiming through the nearest ancestor are preferred to those claiming through the more remote.

VI. If there be several children, or one child and the issue of one or more, and any such surviving child die under age, and unmarried, the estate of such child which came from such deceased parent passes to the other children of the same parent and the issue of such by right of representation.

VII. If all the other children be dead, in such case, and any of them have left issue, then the estate descends to such issue equally if in the same degree, otherwise by right of representation.

VIII. If decedent leave neither husband, wife, nor kindred, and any portion of the property was community property, such common property shall go to the father of the deceased spouse, and if he be dead to the mother, and if she be also dead to the brothers and sisters and their issue *per stirpes*.

IX. If there be no one to take under any of the foregoing sections the property escheats to the State for the support of the common schools.

X. An illegitimate child is made heir by a written, signed, and witnessed acknowledgment of paternity; is always heir of the mother; but does not represent father or mother to inherit from any kindred, unless the parents have married and the father, after such marriage, have acknowledged him or adopted him. And the issue of marriages null in law are legitimate.

XI. If an illegitimate child, unacknowledged and unadopted by his father, die intestate without issue, his estate goes to his mother or her heirs.

XII. Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the estate come from an ancestor; in which case, those not of the blood of such ancestor are excluded.

XIII. Advancements to lineal descendants must be accounted for, but in no

case is it necessary to refund. All gifts and grants are advancements, if so expressed in the gift or grant, or if so charged in writing by the decedent or acknowledged as such by the heir. If the value be expressed as aforesaid it will be so held in the distribution ; otherwise the value is taken as of the time of the gift.

XIV. There are special provisions for the descent of community property where husband or wife survives. Civil Code, 1899, § 1386 *et seq.*

In *Colorado*, —

I. If there be a surviving husband or wife and children and their descendants, then one half to such survivor, and the other half to children or descendants. If there be a surviving husband or wife, and no children nor descendants of children, then the whole estate to such survivor. If there be no surviving husband or wife, then the whole estate descends to children or their descendants ; the descendants of children, in each case, taking collectively the share which their parent would have had.

II. In default of the above, in succession to (1) father, (2) mother, (3) brothers and sisters, (4) or to the descendants of brothers and sisters.

III. To grandfather, grandmother, uncles, aunts, and their descendants.

IV. To nearest lineal ancestors, and their descendants.

V. Children and descendants of children of the half blood inherit the same as children and descendants of the whole blood; but collateral relations of the half blood inherit only half as much as those of the whole blood, if there be any of the last-named living.

VI. Posthumous children inherit, but none others can inherit unless in being and capable in law of taking as heirs at the time of the intestate's death.

VII. Advancements are charged if so desired by the other heirs.

VIII. Illegitimate children inherit if the parents subsequently intermarry and the father recognizes them as his.

IX. Descent from a bastard is as follows : —

1. To surviving widow or husband and children as in other cases.

2. To surviving widow or husband.

3. To the mother and her children and their descendants ; one half to the mother, the other half to her descendants *per stirpes*.

4. To the mother's next of kin. Mills' Annot. Stat. 1891, § 1524 *et seq.*

In *Connecticut*, —

I. To the children of the intestate, and their legal representatives.

II. To the parent or parents of the intestate.

III. To brothers and sisters of the intestate of the whole blood, and their representatives.

IV. To the brothers and sisters of the half blood, and their representatives.

V. To the next of kin in equal degree, kindred of the whole blood to take in preference to kindred of the half blood in equal degree, and no representatives to be admitted among collaterals after the representatives of brothers and sisters.

VI. Estates which came to the intestate from his parent, ancestor, or other kindred, go, —

1. To the brothers and sisters of the intestate, or their representatives, of the blood of the person or ancestor from whom such estate came or descended.

2. To the children of such person or ancestor, and their representatives.

3. To the brothers and sisters of such person or ancestor, and their representatives.

4. If there be none such, then it is divided as other real estate. When such intestate shall be a minor, and shall not have any lineal descendants, or brother or sister, or any parent, such estate shall be distributed equally to the next of kin to the intestate of the blood of the person or ancestor from whom such estate came or descended; and if there be no such kindred, then to the next of kin of the intestate generally. And in ascertaining the next of kin in all cases, the rule of the civil law shall be adopted.

VII. Children born before marriage whose parents afterwards intermarry and recognize them as their own, are deemed legitimate.

VIII. Children or other descendants who receive advancements shall, themselves or their representatives, have only so much of the estate as will, together with the advancement, make their share equal to what they would have received had no advancement been made. Gen. Stat. 1888, § 630 *et seq.*; Act June 17, 1901.

In *Delaware*, when any person having title or right, legal or equitable, to any lands, tenements, or hereditaments, in fee-simple, dies intestate, such estate descends in coparcenary, —

I. To the children of the intestate, and their issue, by right of representation.

II. If there be no issue, then to his brothers and sisters of the whole blood and their issue, by right of representation.

III. Estates to which the intestate has title, by descent or devise, from his parent or ancestor, go, in default of issue, to his brothers and sisters and their issue, by right of representation, provided that brothers and sisters of the whole blood and their issue, shall be preferred to brothers and sisters of the half blood and their issue.

IV. If there be not any of these, then to the father.

V. If there be no father, then to the mother.

VI. If there be no kindred above mentioned, then to the next of kin in equal degree, and their issue, by representation; provided that collateral kindred, claiming through a nearer common ancestor, shall be preferred to those claiming through one more remote.

VII. The word "issue" includes all the lawful lineal descendants of the ancestor. "Kin" and "kindred" signify kin and kindred by blood or consanguinity, and the degrees of consanguinity are computed according to the method of the civil law. Inheritance by right of representation takes place when the issue of a deceased heir take the same share or right in the estate of another person which their parent would have taken, if living; and such representation shall hold although the descent shall be entirely to issue of deceased children, brothers, sisters, or other kin. Posthumous children, born alive, shall be considered as though living at the death of their parents.

VIII. If an illegitimate-born person dies intestate and without lawful issue, the mother inherits, if living, and in case of her death, her lawful issue, share and share alike. Laws, 1893, c. 85.

In the *District of Columbia*, the lands, tenements, or hereditaments of an intestate descend, —

First, to the child or children and their descendants, if any, equally, and if no child or descendant, and the estate descended to the intestate on the part of the

father, then to the father, and if no father living, then to the brothers and sisters of the intestate of the blood of the father and their descendants equally, and if no brother or sister as aforesaid or descendant from such brother or sister, then to the grandfather on the part of the father, and if no such grandfather living, then to the descendants of such grandfather and their descendants in equal degree equally, and if no descendants of such grandfather, then to the father of such grandfather, and if none such living, then to his descendants in equal degree, and so on, passing to the next lineal male paternal ancestor, and if none such, to his descendants in equal degree without end, and if no paternal ancestor or descendant from such ancestor, then to the mother of the intestate, and if no mother living, to her descendants in equal degree equally, and if no mother living or descendants from such mother, then to the maternal ancestors in the same manner as is above directed as to the paternal ancestors and their descendants, and if the estate descended to the intestate on the part of the mother, and the intestate shall die without any child or descendants as aforesaid, then the estate shall go to the mother, and if no mother living, then to the brothers and sisters of the intestate of the blood of the mother and their descendants in equal degree equally, and if no such brother or sister, or their descendants, then to the grandfather on the part of the mother, and if no such grandfather living, then to his descendants in equal degree equally, and if no such descendant of such grandfather, then to the father of such grandfather, and if none such living, then to his descendants in equal degree, and so on, passing to the next male maternal ancestor, and if none such living, to his descendants in equal degree, and if no such maternal ancestor or descendant from any maternal ancestor, then to the father of the intestate, and if no father living, to his descendants in equal degree equally, and if no father living or descendant from the father, then to the paternal ancestors and their descendants in the same manner as is above directed as to the maternal ancestors ; and if the estate is vested in the intestate by purchase, and there be no child or descendant of such intestate, then the estate shall descend to the brothers and sisters of such intestate of the whole blood, and their descendants in equal degree equally, and if no brother or sister of the whole blood, or descendant from such brother or sister, then to the brothers and sisters of the half blood and their descendants in equal degree equally, and if no brother or sister of the whole or half blood, or any descendant therefrom, then to the father, and if no father living, then to the mother, and if no mother living, then to the grandfather on the part of the father, and if no such grandfather living, then to the descendants of such grandfather in equal degree equally, and if no such grandfather or his descendant, then to the grandfather on the part of the mother, and if no such grandfather, then to his descendants in equal degree equally, and so on without end, alternating the next male paternal ancestor and his descendants, and the next male maternal ancestor and his descendants, and giving preference to the paternal ancestor and his descendants, and if there be no descendants or kindred of the intestate as aforesaid to take the estate, then the same shall go to the husband or wife, as the case may be, and if the husband or wife be dead, then to his or her kindred in the like course as if such husband or wife had survived the intestate, and then had died entitled to the estate by purchase, and if the intestate has had more husbands or wives than one, and all shall die before such intestate, then the estate shall be equally divided among the kindred of the several husbands or wives in equal degree equally.

Posthumous children of the intestate and their descendants inherit as if born at the death of their parents, but no others.

If in the descending or collateral line any father or mother may be dead, the child or children of such father or mother shall, by representation, be considered in the same degree as the father or mother would have been if living.

Any child or children of the intestate, or their issue, to whom advancement of real estate has been made shall not be entitled to share by descent, without bringing such advancement into hotchpot, if there be another child or children unprovided for.

Illegitimate children whose parents afterwards marry and who are acknowledged by the father are legitimated. Comp. Stat. 1894, c. 18.

In *Florida*, real estate of inheritance descends in parcenary to the male and female kindred, —

I. To the children and their descendants and the husband, if the decedent be a married woman and the husband survive her.

II. If there be no children or their descendants, to the surviving husband or wife, if any.

III. Failing all of the aforesaid, to the father.

IV. Failing all of the aforesaid, then to the mother, brothers, and sisters and their descendants.

V. Failing all of the aforesaid, the inheritance shall be divided into moieties, one of which shall go to the paternal, and the other to the maternal kindred in the following course: —

1. To the grandfather.

2. To the grandmother, uncles and aunts on the same side and their descendants.

3. To the great-grandfathers or great-grandfather, if there be but one.

4. To the great-grandmothers or great-grandmother, if there be but one, and the brothers and sisters of the grandfathers and grandmothers and their descendants.

5. And so on without end, passing to the nearest lineal male ancestors, and for want of them to the lineal female ancestors, in the same degree, and the descendants of such male and female ancestors.

VI. Whenever an infant shall die without issue, leaving no husband or wife surviving, having title to any real estate of inheritance, it shall descend in the following course: —

1. To the father if he survive.

2. If the father be dead, to the mother if she survive.

3. Failing father and mother, to the brothers and sisters and their descendants, if any survive.

4. Failing all of the foregoing the title shall descend according to the general rules of descent. If the infant leave a husband or wife, such husband or wife shall take all such infant's property. (Amendment of May 22, 1901.)

VII. Where the estate is directed to go by moieties to the paternal and maternal kindred, if there should be no such kindred on the one part, the whole shall go to the other part, and if there be no kindred either on the one part or the other, and the wife or husband of the intestate be dead, the whole shall go to her or his kindred in the like course as if such husband or wife had survived the intestate and then died entitled to the estate.

VIII. Where the inheritance is directed to pass to the ascending and collateral kindred of the intestate, if part of such collaterals be of the whole blood of the

intestate, and the other part of the half blood only, those of the half blood shall inherit only half as much as those of the whole blood; but if all be of the half blood, they shall have whole portions, only giving to the ascendants, if there be any, double portions.

IX. Where the children of the intestate, or mother, brothers, and sisters, or his grandmother, uncles, and aunts, or any of his female lineal ancestors, living with the children of his deceased lineal ancestors, male and female, in the same degree, come into the partition, they shall take *per capita;* and where a part of them being dead and a part living, the issue of those dead have right to partition, such issue shall take *per stirpes.*

X. Children adopted according to the law of another State and afterwards becoming citizens of Florida, inherit as if adopted according to the law of Florida.

XI. Advancements to children must be brought into hotchpot, and the value of the estate advanced shall be estimated at the time of the advancement and not at the death of the intestate.

XII. No right in an inheritance shall accrue to any person other than the children of the intestate, unless they be in being and capable in law to take as heirs at the time of the intestate's death.

XIII. Bastards shall be capable of inheriting or of transmitting inheritance on the part of the mother. Rev. Stat. 1892, § 1815 *et seq.*

— In *Georgia*, real estate descends, —

I. On the death of a wife intestate, without issue, to the husband in fee. If there are children, or their descendants, the husband shares equally with them, *per capita* as between the husband and children, *per stirpes* as between the husband and descendants of children.

II. On the death of a husband intestate, without issue, the wife is the sole heir. If there are children or descendants, she shares equally with them, unless the shares exceed five, when the wife takes one fifth, and the descendants the other four.

III. Children and their descendants are in the first degree, and inherit equally.

IV. If there is no widow or husband or surviving descendant, brothers and sisters inherit. The half blood on the paternal side inherits with the whole blood. In default of these, the half blood on the maternal side. There is no representation among collaterals except children and grandchildren of deceased brothers or sisters.

V. The father inherits equally with the brothers and sisters. If there is no father, the mother, if alive, takes his share. If the mother is not a widow, she takes nothing except as to the estate of her only or last surviving child, in which case she inherits as if a widow.

VI. In all degrees more remote than the above, paternal and maternal kindred are on the same footing.

VII. First cousins, uncles, and aunts are next in degree to brothers and sisters.

VIII. The more remote degrees are ascertained by the English canon law.

IX. Where husband and wife, parent and child, brothers and sisters, or other persons who could inherit each from the other are killed or lost, under circumstances making it impossible to determine which died first, the property of each shall descend to their respective heirs excluding each as heir of the other; but

nothing herein shall be held to prevent children of either from inheriting as heirs of the other. Code, 1895, § 3355 *et seq.*

X. Bastards may inherit from their mother and from each other, children of the same mother. If a mother have both legitimate and illegitimate children they shall inherit alike the estate of the mother. If a bastard dies leaving no issue or widow his mother, brothers and sisters shall inherit his estate equally. The children of a deceased bastard represent the deceased parents.

XI. If a bastard dies intestate, leaving no widow or lineal descendant or illegitimate brother or sister, or descendant of a brother or sister, or mother, but shall leave a brother or sister of legitimate blood, such brother or sister or descendant of such brother or sister, may inherit the estate of such intestate ; but in default of any such person, the brothers and sisters of the mother of such bastard, or their descendants or the maternal grandparents of such bastard may inherit the estate of such bastard, to be divided amongst said persons in accordance with the degrees of consanguinity prescribed in the laws for the distribution of other estates. § 2510 *et seq.*

In *Idaho*, real estate descends as follows : —

I. If there is a surviving husband or wife and one child only, in equal shares to each. If there are more children, one-third goes to the husband or wife, and two-thirds to the children in equal shares, the issue of any deceased child taking the share of the deceased child.

II. If there is no issue, one-half goes to the surviving husband or wife, and one-half to the intestate's father.

III. If there is no issue, nor husband or wife, all goes to the father ; if in such case there is no father, to the brothers, sisters, and mother of the intestate equally ; if in such case there is no brother or sister, then all goes to the mother, to the exclusion of the issue of deceased brothers and sisters.

IV. If the intestate leaves neither issue, father, mother, brother, or sister, the whole goes to the surviving husband or wife.

V. If the intestate leaves none of the above, the estate goes to the next of kin, in equal degree, preferring those claiming through the nearest ancestor.

VI. If an infant dies unmarried, his or her share descends to the other children of the same parent and their issue, *per stirpes.*

VII. If the intestate leaves no husband or wife or kindred, the estate goes to the Territory, for the schools.

VIII. The degrees of kindred are reckoned as in the civil law.

IX. Kindred of the half blood are excluded only in case of inheritances from the intestate's ancestor.

X. Illegitimate children inherit from the mother, and their estate descends, in default of issue, to her or her heirs. Illegitimate children are the heirs of the person who acknowledges in a witnessed writing that he is their father.

XI. Advancements made to any child or other lineal descendant form a part of the estate of the decedent, and must be brought into hotchpot ; if the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from distribution, but he must not be required to refund any part of such advancement. All gifts and grants are made as advancements if so expressed in the gift or if charged in writing by the decedent as an advancement, or acknowledged in writing as such by the child or other successor as heir. The advance is valued as expressed in the conveyance or charge made by the decedent or in the

acknowledgment of the party receiving it, otherwise it is to be estimated according to its value when given. Advancements to a child or other lineal descendant who dies leaving issue before the decedent must be taken into consideration in the division and distribution of the estate, to the representatives of the heirs receiving the advancement.

XII. Posthumous children are considered as living at the death of their parents. Rev. Stat. 1887, § 5700 *et seq.*

In *Illinois*, real estate descends, —

I. To children and their descendants by right of representation.

II. If no children or their descendants, nor widow, nor surviving husband, then to the parents, brothers, and sisters of the deceased, in equal parts ; allowing to each of the parents, if living, a child's part, or to the survivor of them, if one be dead, a double portion ; and if there be no parent, then the whole to the brothers and sisters and their descendants.

III. Where there is a widow or surviving husband, and no children or their descendants, then one half of the real estate goes to the widow or surviving husband as her or his exclusive estate forever ; the rest goes as in IV.

IV. If there be none of the above-mentioned persons, then the estate descends in equal parts to the next of kin in equal degree, computing by the rules of the civil law ; and there is no representation among collaterals, except with the descendants of the brothers and sisters of the intestate ; and there is no distinction between the kindred of the whole and the half blood.

V. If an intestate leaves a widow or surviving husband, and no kindred, his or her estate shall descend to such widow or surviving husband.

VI. If there is no widow or surviving husband, and no kindred, the estate escheats to the county where most of it is situated.

VII. An illegitimate child shall be the heir of its mother and any maternal ancestor and of any person from whom its mother might have inherited, if living ; and the lawful issue of an illegitimate person shall represent such person, and take, by descent, any estate which the parent would have taken, if living. The estate, real and personal, of an illegitimate person, shall descend to and vest in the widow or surviving husband and children, as the estate of other persons in like cases. In case of the death of an illegitimate intestate leaving no child or descendant of a child, the whole estate, personal and real, shall descend to and absolutely vest in the widow or surviving husband. When there is no widow or surviving husband, and no child or descendants of a child, the estate of such person shall descend to and vest in the mother and her children and their descendants — one half to the mother and the other half to be equally divided between her children and their descendants, the descendants of a child taking the share of their deceased parent or ancestor. In case there is no heir as above provided, the estate of such person shall descend to and vest in the next of kin to the mother of such intestate, according to the rule of the civil law. When there are no heirs or kindred, the estate of such person shall escheat to the State, and not otherwise. An illegitimate child whose parents have intermarried, and whose father has acknowledged him or her as his child, shall be considered legitimate.

VIII. Advancements of real or personal estate made to any child or descendant must be brought into hotchpot, but the one to whom such advancement is made shall not be required to refund any part thereof although it exceeds his

share. The advancement is to be valued as expressed in the conveyance or charge thereof made by the intestate, or in the written acknowledgment thereof by the party receiving it. Otherwise it shall be estimated according to its value when given. No gift is deemed an advancement unless so expressed or charged in writing by the intestate or acknowledged in writing by the child or other descendant. Advancements to a child or other lineal descendant who dies leaving issue before the decedent, must be taken into consideration in the division and distribution of the estate to the representatives of the heirs receiving the advancement.

IX. A posthumous child of an intestate is entitled to distribution as if born in the lifetime of the father. Rev. Stat. 1899, c. 39.

In *Indian Territory*, the rules of descent are the same as in Arkansas. Act of Congress, approved May 2, 1890.

In *Indiana*, real property descends, —

I. To the children and their descendants equally, if in the same degree ; if not, *per stirpes*, and posthumous children inherit equally with those born before the death of the ancestor.

II. If no descendants, then half to the father and mother as joint-tenants, or to the survivor; and the other half to the brothers and sisters, and their issue.

III. If there be no father and mother, the brothers and sisters of the intestate take the whole. If there be no brothers nor sisters or descendants of them, it goes to the father and mother as joint-tenants ; and if either be dead, to the other.

IV. If there be none of these, if the inheritance came from the paternal line, then it goes, —

1. To the paternal grandfather and grandmother as joint-tenants, or the survivor of them.

2. To the uncles and aunts and their issue.

3. To the next of kin in equal degree among the paternal kindred.

4. If none of these, then to the maternal kindred in the same order.

V. Maternal inheritances go to the maternal kindred in the same manner.

VI. Estates not ancestral descend in two equal parts to the paternal and to the maternal kindred; and on failure of either line, the other takes the whole.

VII. Kindred of the half blood inherit equally with those of the whole blood, except that ancestral estates go only to those of the blood of the ancestor; provided that, on failure of such kindred, other kindred of the half blood inherit as if they were of the whole blood.

VIII. When the estate came to the intestate by gift or by conveyance, in consideration of love and affection, and he dies without issue, it reverts to the donor, if he be still living, saving to the widow or widower his or her rights therein ; provided that the husband or wife of the intestate shall have a lien thereon for the value of their lasting improvements.

IX. In default of heirs, it escheats to the State for the use of the common schools.

X. Tenancies by the curtesy and in dower are abolished, and the widow takes one third of the estate in fee-simple, free from all demands of creditors ; provided that, when the estate exceeds in value $10,000, she takes one fourth only ; and when it exceeds $20,000, one fifth only.

XI. When the widow marries again, she cannot alienate the estate; and if during such marriage she die, the estate goes to her children by the former marriage, if any there be.

XII. A surviving husband inherits one third of the real estate of the wife.

XIII. If a husband die, leaving a widow and only one child, the real estate descends one half to each.

XIV. When a husband or wife dies, leaving no child, but a father or mother, or either of them, then three fourths of the estate goes to the widow or widower, and one fourth to the father and mother jointly, or the survivor of them; but if it does not exceed $1,000, the whole to the widow or widower.

XV. If there be no child or parent, the whole goes to the surviving husband or wife.

XVI. The real and personal estate of any man dying intestate, without heirs resident in any part of the United States at the time of his death, or legitimate children capable of inheriting without the United States, shall descend to and be vested in his illegitimate child or children who are residents of this State or any of the United States; and such illegitimate child or children shall be deemed and taken to be the heir or heirs of such intestate in the same manner, and entitled to take by descent or distribution to the same effect, and extent as if such child or children had been legitimate: Provided, that the intestate shall have acknowledged such child or children as his own during his lifetime. And provided further, That the testimony of the mother of such child or children shall in no case be sufficient to establish the fact of such acknowledgment. If a man shall marry the mother of an illegitimate child, and acknowledge it as his own, such child shall be deemed legitimate. The mother of an illegitimate child dying intestate, without issue or other descendant, shall inherit his estate; and if such mother be dead, her descendants or collateral kindred shall take the inheritance in the order hereinbefore prescribed.

XVII. The estate of a person dying intestate, without kindred capable of inheriting, shall escheat to the State, and shall be applied to the support of common schools.

XVIII. Advancements in real or personal property shall be charged against the child or descendants of the child to whom the advancement is made in the division or distribution of the estate, but if the advancement exceed the equal proportion of the child advanced, the excess shall not be refunded. In the division or distribution of an estate, the amount or value of an advancement shall be estimated according to the amount or value when given. Annot. Stat. 1894, § 2622 *et seq.*

In *Iowa*, —

I. To children and their issue, by right of representation.

II. If no issue, one half to the parents of the intestate, and the other half to his wife; if he leaves no wife, the portion which would have gone to her goes to his parents.

III. If one of the parents be dead, the surviving parent takes the share of both, including that which would have belonged to the intestate's wife if she had been living.

IV. If both parents be dead, their portion goes, in the same manner as if they or either of them had outlived the intestate, to their heirs.

V. If heirs are not thus found, the portion uninherited shall go to the wife of

the intestate, or to her heirs if dead, according to like rules ; and if he has had more than one wife, who either died or survived in lawful wedlock, it shall be equally divided between the one who is living and the heirs of those who are dead, or between the heirs of all, if all are dead, such heirs taking by right of representation.

VI. If there be no heirs, the estate escheats to the State.

VII. Property given by way of advancement to an heir must be brought into hotchpot and is to be valued as of the time of the gift, but if such advancement exceeds the amount to which he would be entitled he cannot be required to refund.

VIII. Illegitimate children inherit from their mother and she from them ; they inherit from the father when the paternity is proven during his life or they have been recognized by him as his children, but such recognition must have been general and notorious or else in writing. Under such circumstances if the recognition has been mutual the father may inherit from his illegitimate children. Code, 1897, § 3378 *et seq.*

In *Kansas*, —

I. To children in equal shares, and to the issue of such by right of representation.

II. To the wife ; and if no wife, to the parents.

III. If one of the parents be dead, the whole of the estate shall go to the surviving parent ; and if both parents be dead, it shall be disposed of in the same manner as if they or either of them had outlived the intestate, and died in the possession and ownership of the portion thus falling to their share, or to either of them ; and so on through ascending ancestors and their issue.

IV. Children of the half blood inherit equally with those of the whole blood.

V. Posthumous children inherit in like manner as if born in the lifetime of the intestate.

VI. Property given by way of advancement to an heir must be brought into hotchpot as of its value when given to him, but if such advancement exceeds the amount to which he would be entitled he cannot be required to refund.

VII. Illegitimate children inherit from the mother and the mother from the children. They shall also inherit from the father whenever they have been recognized by him as his children, but such recognition must have been general and notorious or else in writing. Under such circumstances, if the recognition of relationship has been mutual, the father may inherit from his illegitimate children. In thus inheriting from an illegitimate child, the mother and her heirs take preference of the father and his heirs. Gen. Stat. 1897, c. 109.

In *Kentucky*, —

I. To children and their descendants.

II. If no descendants, to father and mother, if both are living, one moiety each ; if father be dead, then to mother, if living, one moiety, and the other moiety to brothers and sisters and their descendants ; if there are no brothers or sisters, or their descendants, the whole goes to the mother ; if the mother be dead, then the whole estate to the father ; if no father nor mother, then, —

III. To brothers and sisters, and their descendants.

IV. If none, one moiety of estate to the paternal and the other to the maternal kindred in the following order: first, to grandfather and grandmother equally, if both be living ; but if one be dead, then the entire moiety to survivor ; if no grandfather or grandmother, then, —

V. To uncles and aunts, and their descendants.

VI. If none, to great-grandfathers and great-grandmothers, in the same manner as prescribed for grandfather and grandmother.

VII. If none, to brothers and sisters of grandfathers and grandmothers, and their descendants ; and so on.

VIII. If there is no kindred of one parent, the whole estate to the kindred of the other. If neither paternal nor maternal kindred, the whole estate descends to the husband or wife of the intestate ; or, if dead, to his or her kindred.

IX. When any or all of a class first entitled to inherit are dead, leaving descendants, such descendants take *per stirpes.*

X. Collaterals of the half blood shall inherit only half so much as those of the whole blood, or as ascending kindred, when they take with either.

XI. The estate of bastards shall be distributed in the same manner as that of persons born in lawful wedlock, except that the inheritance shall go to the mother and her kindred, and bastards shall be capable of inheriting from their mother and her kindred. If the parents of an illegitimate child intermarry, such child or its descendants, if recognized by the father before or after marriage, shall be deemed legitimate.

XII. Posthumous children, born within ten months after the death of the intestate, inherit as if in being at the time of such death.

XIII. When a person dies intestate and without issue, having real estate of inheritance, the gift of either of his parents, such parents, if living, shall inherit the whole of such estate.

XIV. If an infant dies without issue, having the title to real estate derived by gift, devise, or descent from one of his parents, the whole shall descend to that parent and his or her kindred as herein before directed, if there is any ; and if none, then in like manner to the other parent and his or her kindred ; but the kindred of one parent shall not be so excluded by the kindred of the other parent, if the latter is more remote than the grandfather, grandmother, uncles and aunts of the intestate and their descendants.

XV. Advancements to a descendant must be brought into hotchpot according to their value when given. The maintaining, or educating, or the giving of money to a child or a grandchild without any view to a portion or settlement in life shall not be deemed an advancement. Stat. 1894, § 1393 *et seq.*

In *Louisiana*, —

I. To the children and their issue ; if in equal degree, then *per capita ;* otherwise *per stirpes.*

II. To the parents of the intestate, one moiety ; and the other moiety to his brothers and sisters and their issue. If one parent be dead, his or her share goes to the brothers and sisters of the deceased, who then have three fourths. If both parents be dead, the whole goes to the brothers and sisters and their issue.

III. If the brothers and sisters are all of the same marriage, they share equally. If they are of different marriages, the portion is divided equally between the paternal and maternal lines of the intestate, the german brothers and sisters taking a part in each line. If the brothers and sisters are on one side only, they take the whole, to the exclusion of all relations of the other line.

IV. If there be no issue, nor parent, nor brothers, nor sisters, nor their issue, then the inheritance goes to the *ascendants* in the paternal and maternal lines, one moiety to each, those in each line taking *per capita.* If there is in the nearest

degree but one ascendant in the two lines, he excludes all others of a remoter degree, and takes the whole.

V. If there be none of the heirs above mentioned, then the inheritance goes to the collateral relations of the intestate, those in the nearest degree excluding all others. If there are several persons in the same degree, they take *per capita*.

VI. Representation takes place *ad infinitum* in the direct descending line, but does not take place in favor of ascendants; the nearest in degree always excluding those of a degree superior or more remote.

VII. In the collateral line, representation is admitted in favor of the issue of the brothers and sisters of the intestate, whether they succeed in concurrence with the uncles and aunts; or whether, the brothers and sisters being dead, their issue succeed in equal or unequal degrees.

VIII. When representation is admitted, the partition is made *per stirpes;* and if one root has produced several branches, the subdivision is also made by roots in each branch, and the members of the branch take between themselves *per capita*.

IX. When the deceased has left neither descendants, ascendants, nor collateral relations, a surviving wife who has not been separated from her husband shall inherit from him. If, on the contrary, the wife died without leaving lawful ascendants, descendants, or collateral relations, her husband who has not been separated from her shall not inherit from her except in case she shall leave no natural child by her duly acknowledged.

X. Natural children inherit from their mother when they have been duly acknowledged by her, if she has left no lawful children or descendants, to the exclusion of her father and mother and other descendants or collaterals of lawful kindred.

XI. Natural children inherit from their father who has duly acknowledged them, when he has left no descendants, ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the State.

XII. The law does not grant any right of inheritance to natural children to the estate of legitimate relations of their father or mother.

XIII. The estate of a natural child deceased without posterity belongs to the father or mother who has acknowledged him, or in equal proportions to both when he has been acknowledged by both.

XIV. If the father and mother of the natural child die before him, the estate of such natural child shall pass to his natural brothers and sisters, or to their descendants.

XV. In defect of lawful relations or of a surviving husband or wife, or acknowledged natural children, the succession belongs to the State. Rev. Civ. Code, 1900, art. 902 *et seq.*

XVI. Children or grandchildren, coming to the succession of their fathers, mothers, or other ascendants, must collate what they have received from them by donation *inter vivos*, directly or indirectly, and they cannot claim the legacies made to them by such ascendants unless the donations and legacies have been made to them expressly as an advantage over their co-heirs, and besides their portion. This rule takes place whether the children or their descendants succeed to their ascendants as legal or as testamentary heirs, and whether they have accepted the succession unconditionally, or with the benefit of inventory. Art. 1228.

In *Maine*, real estate descends as follows : —

I. To the children and the issue of deceased children, *per stirpes*. If any child died under age and unmarried, or without issue, all estate descending to such child from either parent by gift, devise, or descent goes to the other children of the same parent, and the issue of such as are deceased, *per stirpes*, or if all are in the same degree, *per capita*.

II. If no child is living, to the lineal descendants, *per capita*, if all are in the same degree ; otherwise, *per stirpes*.

III. If no issue, to the father.

IV. If no issue, nor father, to the mother, brothers, and sisters, and the children of those deceased, *per stirpes*.

V. If no issue, nor father, nor brothers or sisters, to the mother, in exclusion of descendants of deceased brothers or sisters.

VI. If none of these, to the next of kin in equal degree, those claiming through the nearest ancestor being preferred.

VII. If there are no kindred, then to the surviving husband or wife, in fee.

VIII. If none of these, then the estate escheats.

IX. The degrees of kindred are computed according to the rules of the civil law ; kindred of the half blood inherit equally with those of the whole blood in the same degree.

X. An illegitimate child is the heir of parents who intermarry, and is the heir of his mother and of any person who acknowledges himself to be his father in a writing signed in the presence of, and attested by, a competent witness ; and if his parents intermarry and have other children before his death, or his father so acknowledges him or adopts him into his family, he shall inherit from his lineal and collateral kindred, and they from him, as if legitimate, but not otherwise.

XI. If an illegitimate child dies intestate without lawful issue, his estate descends to his mother, and if she has died, to her heirs at law, unless such child leaves a husband or widow, who then inherits an equal share with the mother or with her children.

XII. Gifts of real estate to a child or grandchild are deemed an advancement when so expressed therein or charged as such by the intestate, or acknowledged in writing to be such. They must be brought into hotchpot as of the value expressed in the gift or acknowledgment aforesaid, otherwise as of the time when given. When the advancement exceeds his share he is excluded from distribution, but he shall not be required to refund. If an advancement of personal estate exceeds his share of the personal estate, he receives so much less of the real estate as will make his whole share equal. If such child or grandchild die before the intestate, leaving issue, the advancement made to him shall be regarded as made to the issue. Rev. Stat. 1883, c. 75.

In *Maryland*, when any person dies seised of an estate in any lands, tenements, or hereditaments, in fee-simple or in fee-simple conditional, or of an estate in fee-tail, such estate descends, —

I. To children and their descendants.

II. If no issue, and the estate descended on the part of the father, then to the father.

III. If no father, to the brothers and sisters of the intestate of the blood of the father and their descendants.

IV. If none of these, then to the grandfather on the part of the father, if

living, otherwise to his descendants in equal degree ; and if there be none such, then to the father of such grandfather and his descendants ; and so on to the next lineal male paternal ancestor and his descendants, without end. And if there be no paternal ancestor nor descendants of any, then to the mother and the kindred on her side in the same manner as above directed.

V. If there be no issue, and the estate descended on the part of the mother, then to the mother ; and if no mother living, then to the brothers and sisters of her blood and their descendants ; and if there be none of these, to her kindred in the same order as above ; and in default of maternal kindred, then to the paternal kindred in the same manner as above directed.

VI. If the estate was acquired by purchase, and there be no issue, then it descends, —

1. To the brothers and sisters of the whole blood, and their descendants in equal degree.
2. Then to the brothers and sisters of the half blood.
3. If none of these, to the father.
4. If no father, to the mother.
5. If neither of the above kindred, then to the paternal grandfather and his descendants in equal degree ; then to the maternal grandfather and his descendants in equal degree ; then to the paternal great-grandfather and his descendants in the same manner ; and so on, alternating and giving preference to the paternal ancestor.

VII. If there be no kindred, then the estate goes to the surviving wife or husband, and their kindred, as an estate by purchase ; and if the intestate has had more husbands or wives than one, all of whom are dead, then to their kindred in equal degree, equally.

VIII. No distinction is made between brothers and sisters of the whole and half blood, all being descendants of the same father, where the estate descended on the part of the father ; nor where all are descendants of the same mother, the estate descending on her part.

IX. Children take by representation ; but no representation is admitted among collaterals after brothers' and sisters' children.

X. Bastards are legitimated by the marriage of the parents and acknowledgment by the father. Bastards and their issue inherit from the mother, or from each other, or from the descendants of each other, as the case may be ; and if a bastard die leaving no descendants, or brothers or sisters, or the descendants of such brothers and sisters, the other will inherit ; and if the mother be dead, the heirs at law of the mother.

XI. Any child or descendant of the intestate, born after the death of the intestate, but none others, shall have the same right to inherit as if born before such death.

XII. Advancements of real estate to children or their issue must be brought into hotchpot. Code, 1888, art. 46.

In *Massachusetts*, when a person dies seised of lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein, in fee-simple or for the life of another, they descend, subject to his debts, —

I. In equal shares to his children and the issue of any deceased child, by right of representation ; and if there is no child of the intestate living at his death, then to all his other lineal descendants ; equally, if they are all in the

same degree of kindred to the intestate; otherwise, according to the right of representation.

II. If he leaves no issue, then to his father and mother, in equal shares. If he leaves no issue, or mother, then to his father. If he leaves no issue, or father, then to his mother.

III. If he leaves no issue, nor father or mother, then in equal shares to his brothers and sisters, and to the issue of any deceased brother or sister, by right of representation. If all such issue are in the same degree of kindred to the intestate, they share equally; otherwise, according to the right of representation.

IV. If he leaves no issue, and no father, mother, brother, nor sister, nor issue of any deceased brother or sister, then to his next of kin in equal degree; those claiming through the nearest ancestor to be preferred to those claiming through one more remote.

V. If the intestate is a married woman, and leaves a husband but no issue, he takes real estate in fee not exceeding $5,000 in value. If the intestate leaves a widow and no issue, she takes real estate in fee not exceeding $5,000 in value, in addition to her dower. If the intestate leaves a widow and no kindred, his estate descends to his widow; and if the intestate is a married woman and leaves no kindred, her estate descends to her husband.

VI. In default of kindred, the estate escheats to the Commonwealth.

VII. It is provided that the degrees of kindred shall be computed according to the rules of the civil law, and that the kindred of the half blood shall inherit equally with those of the whole blood in the same degree.

VIII. An illegitimate child shall be the heir of his mother and of any maternal ancestor, and the lawful issue of an illegitimate person shall take by representation. If an illegitimate child die intestate and without issue who may lawfully inherit, his mother shall inherit. An illegitimate child whose parents have intermarried, and whose father has acknowledged him, is legitimated.

IX. Posthumous children are considered as living at the death of their parent. Pub. Stat. 1882, cc. 124, 125.

In *Michigan*, when any person dies seised of any lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein, in fee-simple or for the life of another, not having lawfully devised the same, they descend, —

I. In equal shares to children, and the issue of any deceased child by right of representation; and if there be no child, then to his other lineal descendants, equally, if they are all in the same degree of kindred to the intestate; otherwise, according to the right of representation.

II. If there is no issue, one half to the husband or widow, remainder to father and mother equally, if both are living, if not, to the survivor.

III. Failing issue, husband, or widow, to father and mother equally or the survivor.

IV. Failing issue, father, or mother, in equal shares to brothers and sisters and their children by right of representation, subject to rights of surviving husband or widow.

V. Failing all of the foregoing, to the next of kin in equal degree; as between collaterals of equal degree claiming through different ancestors, those claiming through the nearest ancestor are preferred.

VI. If any person die leaving several children, or leaving one child and the issue of one or more other children, and any such surviving child shall die under

age, and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent descends in equal shares to the other children of the same parent, and to their issue by right of representation.

VII. If, at the death of such child under age, all the other children of such deceased parent are also dead, and any of them have left issue, the estate that came to such child by inheritance from such parent descends to all the issue of other children of the same parent equally, if they are in the same degree of kindred to said child ; otherwise, according to the right of representation.

VIII. If the intestate leave a surviving husband or widow, and no kindred, the estate descends to such widow or surviving husband.

IX. If there be no widow or kindred, the estate escheats to the people of the State for the use of the primary-school fund.

X. The degrees of kindred are computed according to the rules of the civil law ; and kindred of the half blood inherit equally with those of the whole blood, in the same degree, unless the inheritance be ancestral ; in which case, those who are not of the blood of such ancestor are excluded.

XI. Bastards inherit from the mother but not through her. If a bastard die intestate without issue, his estate shall descend to his mother, or to his relatives on the part of his mother. Bastards are legitimated by marriage of the parents after birth, or by the written acknowledgment by the father of his paternity, provided such acknowledgment be acknowledged and recorded.

XII. Advancements to a child or other lineal descendant must be brought into hotchpot. Howell's Annot. Stat. 1882, § 5772 *a* ; Acts of 1893, act 200.

In *Minnesota*, real estate descends as follows : —

I. One undivided third goes to the surviving husband or wife.

II. The residue, or if there is no surviving husband or wife, the whole, goes to the children and their issue, by right of representation.

III. If there are no children nor their issue, it goes to the father ; if there is none, one third goes to the mother and two thirds to the brothers and sisters ; if there are no brothers or sisters, the mother takes all, to the exclusion of the issue of any deceased brother or sister.

IV. If there is no issue, father, or mother, then to the brothers and sisters equally, and the issue of deceased brother or sister, by right of representation.

V. If there is no issue, father or mother, sister or brother, then to the next of kin in equal degree, preferring those claiming through the nearest ancestor.

VI. If any child receives a part of an estate of his parent, and dies under age and unmarried, his share goes to the other children of the same parent and their issue. If all are in equal degree, all share equally ; if in unequal degrees, by right of representation.

VII. If the intestate leaves surviving a husband or wife and no kindred, the estate goes to the survivor. If no husband, wife, or kindred, it goes to the State.

VIII. The degrees of kindred are computed by the rules of the civil law, and the half blood inherits like the whole blood.

IX. Posthumous children are considered as living at the death of their parent. Every illegitimate child is the heir of the person who shall, in writing, signed in the presence of a competent witness, acknowledge the paternity of such child, and he is always the heir of his mother. But he cannot inherit through father or mother unless before his death his parents intermarry, and his father, after such marriage, acknowledges him as aforesaid, or adopts him into his family. If any

illegitimate child dies intestate without issue, his estate shall descend to his mother or her heirs at law. Stat. 1891, § 5677 *et seq.*

In *Mississippi*, when any person dies seised of any estate of inheritance in lands, tenements, and hereditaments, it descends, —

I. To his children and their descendants in equal parts, by right of representation.

II. To brothers and sisters and their descendants in the same manner.

III. If there be none of these, then to the father, if living; if not, to the mother; if both be living, then to each in equal portions.

IV. To the next of kin in equal degree, computing by the rules of the civil law.

V. There is no representation among collaterals except with the descendants of the brothers and sisters of the intestate.

VI. There is no distinction between the half and the whole blood, except that the whole blood is preferred to the half blood, in the same degree.

VII. If the intestate leaves a surviving husband or wife and no issue, the whole estate goes to such survivor; if there are children, or their issue, such survivor takes a child's part.

VIII. If there is no person capable of taking under the statute, the estate escheats to the State.

IX. An illegitimate child is legitimated by the marriage of the parents and acknowledgment by the father. Illegitimates shall inherit from their mother and from her other children and from her kindred; and the children of illegitimates and their descendants shall inherit from the brothers and sisters of their father or mother, whether legitimate or illegitimate, and from their grandparents; but the children of illegitimates shall not inherit from any ancestor or collateral kindred if there be legitimate heirs of such ancestor or collateral kindred in the same degree to whom the estate would otherwise descend.

X. Advancements to any children or their descendants must be brought into hotchpot with the whole estate, real and personal. And such advancement shall be valued as of the time it was made.

XI. If any person wilfully cause or procure the death of another in any way he is debarred from inheriting. Annot. Code, 1892, § 1542 *et seq.*

In *Missouri*, real estate of inheritance descends, —

I. To children or their descendants in equal parts.

II. If none of these, to the father, mother, brothers, and sisters, and their descendants, in equal parts.

III. If none of these, then to the husband or wife.

IV. If no husband or wife, then to the grandfather, grandmother, uncles, and aunts, and their descendants, in equal parts.

V. If none of these, then to the great-grandfathers, great-grandmothers, and their descendants, in equal parts; and so on, passing to the nearest lineal ancestors, and their children and their descendants, in equal parts.

VI. If there be no kindred above named, nor any husband or wife, capable of inheriting, then the estate goes to the kindred of the wife or husband of the intestate, in the like course as if such wife or husband had survived the intestate, and then died entitled to the estate.

VII. When some of the collaterals are of the half blood, and some of the whole blood, those of the half blood inherit only half as much as those of the whole blood;

but if all such collaterals be of the half blood, they have whole portions, only giving to the ascendants double portions.

VIII. When all are of equal degree of consanguinity to the intestate, they take *per capita;* if of different degrees, *per stirpes.*

IX. Posthumous children of the intestate inherit as if born in the lifetime of the intestate.

X. Advancements to any of the children of the intestate must be brought into hotchpot. Maintaining, educating, or giving money to a child under age without any view to a portion or settlement in life is not deemed an advancement.

XI. Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, and such mother may inherit from her bastard child. Bastards are legitimated by the marriage of the parents and recognition by the father. Rev. Stat. 1899, § 2908 *et seq.*

In *Montana,* real estate of inheritance descends, —

I. If the decedent leave a surviving husband or wife and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leave a surviving husband or wife and more than one child living, or one child living and the lawful issue of one or more deceased children, one third to the surviving husband or wife and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants ; and if all the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to right of representation. If the decedent leave no surviving husband or wife but leave issue, the whole estate goes to such issue ; and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation.

II. If the decedent leave no issue, the estate goes one half to the surviving husband or wife, and the other to the decedent's father and mother in equal shares, and if either be dead, the whole of said half goes to the other. If there be no father or mother, then one half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. If the decedent leave no issue, nor husband nor wife, the estate must go to his father and mother in equal shares, or if either be dead, then to the other.

III. If there be neither issue, husband, wife, father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation.

IV. If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife.

V. If the decedent leave none of the foregoing, the estate goes to the next of kin, in equal degree, excepting that where there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claim through the nearest ancestors must be preferred to those claiming through an ancestor more remote.

VI. If the decedent leave several children, or one child, and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such

decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

VII. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parents descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation.

VIII. If the decedent leave no husband, wife, or kindred, the estate escheats to the State.

IX. Every illegitimate child is the heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family. The issue of all marriages null in law or dissolved in divorce are legitimate. If an illegitimate child who has not been acknowledged or adopted by his father dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs at law.

X. Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance. Any estate, real or personal, given by the decedent in his lifetime as an advancement to any child, or other lineal descendant, is a part of the estate of the decedent for the purposes of division and distribution thereof among his issue, and must be taken by such child, or other lineal descendant, toward his share of the estate of the decedent. If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such advancement; and if the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent. All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such, by the child or other successor or heir. If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise, it must be estimated according to its value when given, as nearly as the same can be ascertained. Codes, 1895, Div. 2, § 1850 *et seq.*

In *Nebraska*, real estate descends, —

I. In equal shares, to children, and the lawful issue of deceased children.

II. In default of children, to all other lineal descendants, equally, if in the same degree; otherwise, by right of representation.

III. In default of issue, to widow for life, then to the father.

IV. If there is no issue or widow or father, equally, to the mother, if living, brothers and sisters, and the children of deceased brothers and sisters, by right of representation.

V. If there is no issue, widow, father, brother, or sister, to the mother, excluding the issue of brothers or sisters.

VI. If none of these kindred are alive, to the next of kin in equal degree, preferring those claiming through the nearest ancestor.

VII. If the deceased is an unmarried infant, his estate descends equally to the other children of the same parent; if any of them is deceased, his issue take his share; but if all the children are dead, and the issue are in the same degree, they all take equally.

VIII. If there is a widow and no kindred, the estate goes to the widow; if neither widow nor kindred, to the State.

IX. Degrees of kindred are computed according to the civil law. The half blood are excluded from estates which descended from the other ancestor.

X. Posthumous children are considered as living at the death of their parent.

XI. Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as an heir of his mother, and shall inherit his or her estate in whole or in part as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried and had other children, and his father, after such marriage, shall have acknowledged him, as aforesaid, or adopted him into his family, in which case such child and all legitimate children shall be considered as brothers and sisters, and on the death of either of them intestate, and without issue, the other shall inherit his estate, and he theirs, as hereinbefore provided, in like manner as if all the children had been legitimate, saving to the father and mother respectively their rights in the estate of all the said children as provided hereinbefore, in like manner as if all had been legitimate. If any illegitimate child shall die intestate, without lawful issue, his estate shall descend to his mother, or in case of her decease, to her heirs at law.

XII. Any estate, real or personal, that may have been given by the intestate in his lifetime, as an advancement to any child or other lineal descendant, shall be considered as a part of the estate of the intestate, so far as it regards the division and distribution thereof among his issue, and shall be taken by such child or other descendant towards his share of the estate of the intestate. If the amount of such advancement shall exceed the share of the heir so advanced, he shall be excluded from any further portion in the division and distribution of the estate, but he shall not be required to refund any part of such advancement; and if the amount so received shall be less than his share, he shall be entitled to as much more as will give him his full share of the estate of the deceased. If such advancement be made in real estate, the value thereof shall, for the purposes mentioned in the preceding section, be considered a part of the real estate to be divided; and, if it be in personal estate, it shall be considered a part of the personal estate; and if in either case it shall exceed the share of real and personal estate respectively, that would have come to the heir so advanced, he shall not refund any part of it, but shall receive so much less out of the other part of the estate as will make his whole share equal to those of the other heirs who are in the same degree with him. All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant.

If the value of the estate so advanced shall be expressed in the conveyance, or in the charge thereof made by the intestate, or in the acknowledgment of the party receiving it, it shall be considered as of that value in the division and distribution of the estate; otherwise it shall be estimated according to its value when given, as nearly as the same can be ascertained. If any child or lineal descendant so advanced shall die before the intestate, bearing issue, the advancement shall be taken into consideration in the division and distribution of the estate, and the amount thereof shall be allowed accordingly by the representatives of the heirs so advanced, in like manner as if the advancement had been made directly to them. Comp. Stat. 1899, § 2545 *et seq.*

In *Nevada*, real estate descends as follows: —

I. Equally to the surviving husband or wife, and one child or its issue.

II. If there is more than one child, or one child and the issue of deceased child or children, one third to the surviving husband or wife, and the remainder equally to the children and issue, by right of representation.

III. If there is no issue, equally to the surviving husband or wife, and the father. If there is no husband or wife in such case, all goes to the father.

IV. In default of issue, husband or wife, and father, the estate goes equally to the mother, if living, brothers and sisters, and their issue, by right of representation. If there are no brothers or sisters, the mother takes all, excluding the issue of deceased brothers or sisters.

V. If there is a surviving husband or wife, and no issue, father, mother, brother, or sister, the surviving husband takes the whole.

VI. If none of the former are alive, the next of kin in equal degree take, preferring, in case of collaterals, those claiming through the nearest ancestor.

VII. When an unmarried infant dies, the estate which descended to him from his parent goes in equal shares to his brothers and sisters and their issue, by right of representation. If there are no brothers and sisters, and the issue are all of equal degree, they take equally.

VIII. If there is no husband, wife, or kindred, the estate goes to the State for the support of common schools.

IX. Community property on the death of the wife belongs to the husband; on the death of the husband, one half belongs to the wife, and the other to his children. If there are no children, the whole goes to the wife.

X. Posthumous children are considered as living at the death of their parents.

XI. The provisions as to illegitimate children are substantially the same as those of Nebraska.

XII. The provisions as to advancements are substantially the same as those of Nebraska. Gen. Stat. 1885, § 2981 *et seq.*

In *New Hampshire*, the real estate of every intestate descends in equal shares, —

I. To the children of the deceased, and the legal representatives of such of them as are dead.

II. If there be no issue, to the father, if he is living.

III. If there be no issue nor father, in equal shares to the mother, and to the brothers and sisters, or their representatives.

IV. To the next of kin, in equal shares.

V. If the intestate be a minor and unmarried, his estate, derived by descent or devise from his father or mother, goes to his brothers or sisters, or their representatives, to the exclusion of the other parent.

VI. No representation is admitted among collaterals beyond the degree of brothers' and sisters' children; and there is no distinction between the full and half blood.

VII. In default of heirs, it escheats to the State.

VIII. The heirs of a bastard, in the ascending and collateral lines, shall be the mother and her heirs; and bastards and their issue shall be the heirs of the mother. When the mother of a bastard dies, her real estate shall descend and her personal estate be distributed in equal shares to her legitimate and illegitimate children and their issue.

IX. If an heir of a person deceased, or any person through whom the heir claims, has been advanced by the deceased in his lifetime, such advancement shall be accounted, according to its value, as part or the whole of the share of such heir. Such advancements, or any indebtedness of an heir, — the amount having been first determined by the judge, — may be taken into consideration in the division of the real estate; or they may be considered and adjusted by the judge in the decree or distribution of the personal estate. No deed of real estate shall be deemed an advancement unless the same is expressed to be made for love or affection, or unless it is proved to be an advancement by some acknowledgment signed by the party receiving it. No personal property delivered shall be deemed an advancement, unless proved to be such by an acknowledgment in writing, signed by the party receiving it, or by some charge or memorandum thereof in writing, made by the deceased or by his order, or unless delivered expressly as an advancement, in the presence of two witnesses who were requested to take notice thereof. Pub. Stat. 1901, c. 196.

In *New Jersey*, when a person dies seised of any lands, tenements, or hereditaments, in his or her own right in fee-simple, they descend, —

I. To the children of the intestate and their issue, by right of representation, to the remotest degree.

II. To brothers and sisters of the whole blood, and their issue in the same manner.

III. To the father, unless the inheritance came from the part of the mother; in which case it descends as if the father had previously died.

IV. To the mother for life; and, after her death, to go as if the mother had previously died.

V. If there be no such kindred, then to brothers and sisters of the half blood and their issue, by right of representation; but if the estate came from an ancestor, then only to those of the blood of such ancestor, if any be living.

VI. If there be none of these, then to the next of kin in equal degree, subject to the restriction aforementioned as to ancestral estates.

VII. Posthumous children inherit as if born in the lifetime of the father.

VIII. The mother is the heir of her illegitimate, intestate child.

IX. An adopted child becomes the heir of its adopting parent, except that such child cannot inherit estates in tail or property coming from the collateral kindred of such adopting parent by right of representation. On the death of the adopting parent and the subsequent death of the adopted child without issue, the property of such adopting parent shall go to the next of kin of said parent, and if such adopting parent shall have other children by birth, the adopted child shall share the inheritance; and such children shall respectively inherit from and through each other. Gen. Stat. 1895, pp. 1193, 1714.

In *New Mexico*, real estate of inheritance descends, —

I. One-fourth to the surviving husband or wife, and the remainder in equal shares to the children of the decedent, and their heirs by right of representation.

II. If the intestate leave no issue, the whole of his estate shall go to his wife; if he leave no wife, the portion which would have gone to her shall go to his parents. If one of his parents be dead, the portion which would have gone to such deceased parent shall go to the surviving parent.

III. If both parents be dead, the portion which would have fallen to their share, by the above rule, shall be disposed of in the same manner as if they had outlived the intestate, and died in the possession and ownership of the portion thus falling to their share; and so on through the ascending ancestors and their issue.

IV. If heirs are not thus found, the portion uninherited shall go to the heirs of the wife of the intestate, if dead, according to like rules, and if he has had more than one wife, who died, it shall be equally divided among the heirs of all such wives, taking by right of representation.

V. If there be property remaining uninherited, it shall escheat to the Territory.

VI. Posthumous children unprovided for by the father's will shall inherit the same interest as though no will had been made. The amount thus allowed to a posthumous child shall be taken ratably from the interests of heirs, devisees, and legatees, but the will for this reason shall not be otherwise revoked.

VII. Illegitimate children shall inherit from the mother and the mother from the children; they shall inherit from the father whenever they have been recognized by him as his children, but such recognition must have been general and notorious or else in writing. And they shall inherit only when the father has no legitimate children. Under such circumstances, if the recognition of relationship has been mutual, the father may inherit from his illegitimate children, but in thus inheriting from an illegitimate child, the mother and her heirs take preference of the father and his heirs. Illegitimate children become legitimate by the marriage of their parents. Comp. Laws, 1897, § 2031 *et seq.*

In *New York*, the real estate of an intestate descends, —

I. To his lineal descendants.

II. To his father.

III. To his mother.

IV. To his collateral relatives.

Subject, however, to these rules: —

1. Lineal descendants, being in equal degree, take in equal parts.

2. If any of the children of the intestate are living, and others are dead, leaving issue, such issue takes by representation.

3. The preceding rule applies to all descendants of unequal degrees; so that those who are in the nearest degree of consanguinity take the share which would have descended to them had all the descendants in the same degree been living, and the children in each degree take the share of their parent.

4. If there be no descendants, but the father be living, he takes the whole, unless the inheritance came to the intestate on the part of his mother, and the mother be living. But if she be dead, then the inheritance descending on her part goes to the father for life, and the reversion to the brothers and sisters of the intestate, and their descendants; but if there be none living, then to the father in fee.

V. If there be no descendants and no father, or a father not entitled to take

as above, then the inheritance descends to the mother for life, and the reversion to the brothers and sisters of the intestate, and their descendants, by representation ; but if there be none such, then to the mother in fee.

VI. If there be no father or mother capable of inheriting the estate, it descends, in the cases hereafter specified, to the collateral relatives ; in equal parts, if they are of equal degree, however remote from the intestate.

VII. If all the brothers and sisters of the intestate be living, the inheritance descends to them; but if some be dead, leaving issue, the issue take by right of representation ; and the same rule applies to all the direct lineal descendants of brothers and sisters, to the remotest degree.

VIII. If there be no heirs entitled to take under either of the preceding sections, the inheritance, if the same shall have come to the intestate on the part of his father, shall descend, —

1. To the brothers and sisters of the father of the intestate in equal shares, if all be living.

2. If some be living, and others dead, leaving issue, then according to the right of representation.

3. If all the brothers and sisters are dead, then to their descendants.

In all cases, the inheritance is to descend in the same manner as if all such brothers and sisters had been brothers and sisters of the intestate.

IX. If there be no brothers and sisters, nor descendants of such, of the father's side, then the inheritance goes to the brothers and sisters of the mother and their descendants, in the same manner.

X. Where the inheritance has come to the intestate on the part of his mother, the same descends to the brothers and sisters of the mother and to their descendants ; and if there be none such, to those of the father, as before prescribed.

XI. If the inheritance has not come to the intestate on the part of either father or mother, it descends to collaterals on both sides, in equal shares.

XII. Relatives of the half blood inherit equally with the whole blood, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors ; in which case, none inherit who are not of the blood of that ancestor.

XIII. In all cases not otherwise provided for, the inheritance descends according to the course of the common law.

XIV. Real estate held in trust for any other person, if not devised by the person for whose use it is held, descends to his heirs, according to the preceding rules.

XV. A descendant or relative of the intestate begotten before his death, but born thereafter, shall inherit in the same manner as if he had been born in the lifetime of the intestate and had survived him.

XVI. If a child of an intestate shall have been advanced by him, by settlement or portion, real or personal property, the value thereof must be reckoned for the purposes of descent and distribution as part of the real and personal property of the intestate descendible to his heirs and to be distributed to his next of kin ; and if such advancement be equal to or greater than the amount of the share which such child would be entitled to receive of the estate of the deceased, such child and his descendants shall not share in the estate of the intestate ; but if it be less than such share, such child and his descendants shall receive so much only of the personal property, and inherit so much only of the real property, of the intestate, as shall be sufficient to make all the shares of all the children in the whole property, including the advancement, equal. The value of any real or personal property so

advanced, shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise it must be estimated according to the worth of the property when given. Maintaining or educating a child, or giving him money without a view to a portion or settlement in life, is not an advancement. An estate or interest given by a parent to a descendant by virtue of a beneficial power or of a power in trust, with a right of selection, is an advancement. When an advancement to be adjusted consisted of real property, the adjustment must be made out of the real property descendible to the heirs. When it consisted of personal property, the adjustment must be made out of the surplus of the personal property to be distributed to the next of kin. If either species of property is insufficient to enable the adjustment to be fully made, the deficiency must be adjusted out of the other. 5 Rev. Stat. (9th ed.) p. 3604.

In *North Carolina*, when any person dies seised of any inheritance, or of any right thereto, or entitled to any interest therein, it descends according to the following rules: —

I. Inheritances lineally descend to the issue of the person who died last seised; but do not lineally ascend, except as hereinafter stated.

II. Females inherit equally with males, and younger with older children.

III. Lineal descendants represent their ancestor.

IV. On failure of lineal descendants, where the inheritance has been transmitted by descent or otherwise from an ancestor to whom the intestate was an heir, it goes to the next collateral relations of the blood of that ancestor, subject to the two preceding rules.

V. When the inheritance is not so derived, or the blood of such ancestor is extinct, then it goes to the next collateral relation of the person last seised, whether of the paternal or maternal line, subject to the same rules.

VI. Collateral relations of the half blood inherit equally with those of the whole blood, and the degrees of relationship are computed according to the rules which prevail in descents at common law. Provided, that if there be no issue, nor brother, nor sister, nor issue of such, the inheritance vests in the father, if living; and if not, then in the mother, if living.

VII. If there be no heirs, the widow is deemed such, and inherits.

VIII. An estate for the life of another is deemed an inheritance; and a person is deemed to have been seised, if he had any right, title, or interest in the inheritance.

IX. No inheritance shall descend to any person as heir of the propositus unless he or she be in being at the death of the propositus or be born within ten months thereafter.

X. Illegitimates inherit from their mother if she have no legitimate children, but they cannot inherit through her by right of representation. Illegitimates are considered legitimate as between themselves and their representatives. Upon the death of an illegitimate child or his issue without leaving issue, his estate shall descend to such person as would inherit if all such children had been legitimate. Provided that the mother may inherit as stated in rule VI.

XI. Advancements made to children must be accounted for. Code, 1883, § 1281 *et seq.*

In *North Dakota*, estates of inheritance descend, —

I. If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife and

child or issue of such child. If the decedent leaves a surviving husband or wife and more than one child living, or one child living and the lawful issue of one or more deceased children, one third to the surviving husband or wife and the remainder in equal shares to his children and to the lawful issue of any deceased child by right of representation; but if there is no child of the decedent living at his death, the remainder goes to all of his lineal descendants, and if all the descendants are in the same degree of kindred to the decedent they share equally; otherwise they take according to the right of representation. If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living and the issue of the deceased child or children by right of representation.

II. If the decedent leaves no issue and the estate does not exceed in value the sum of five thousand dollars, all the estate goes to the surviving husband or wife, and all the property in excess of five thousand dollars in value, one half thereof goes to the decedent's father, and if he is dead to the decedent's mother. If the decedent leaves no issue, nor husband, nor wife, the estate must go to the father, and if he is dead to the mother. If the decedent leaves a surviving husband or wife and no issue, and no father, nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife.

III. If there is no issue, nor husband, nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation.

IV. If the decedent leaves no issue, nor husband, nor wife, nor father, and no brother or sister is living at the time of his death, the estate goes to his mother to the exclusion of the issue, if any, of deceased brothers or sisters.

V. If the decedent leaves no issue, nor husband nor wife, and no father, nor mother, nor brother, nor sister, the estate must go to the next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote. However, if the decedent leaves several children, or one child and the issue of one or more children, and any such surviving child dies under age and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent and to the issue of any such other children, who are dead, by right of representation.

VI. If at the death of such child, who dies under age, not having been married, all the other children of the same parents are also dead and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation.

VII. If the decedent leaves no husband, wife, or kindred, the estate escheats to the State for the support of common schools.

VIII. The provisions respecting illegitimate children are substantially the same as those in Nebraska.

IX. Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or

gift from some one of his ancestors, in which case those not of the blood of such ancestor are excluded.

X. Advancements to any child or other lineal descendant must be brought into hotchpot, but in no case can the heir advanced be required to refund. Gifts are advancements if so expressed in the gift or charged in writing by the decedent as an advancement or acknowledged in writing as such by the child. The value of the advancement is taken as expressed in the conveyance or charge thereof or in its acknowledgment. Otherwise according to its value when given. When the issue of a person advanced inherit they must account for the advancement.

XI. Posthumous children are considered as living at the death of their parents.

XII. If there are no heirs the property escheats to the State. Rev. Code, 1895, § 3742 *et seq.*

In *Ohio*, when any person dies intestate, having title or right to real estate of inheritance which came to him by devise or deed of gift from any ancestor, such estate descends, —

I. To the children, or their representatives.

II. To the husband or wife, relict of the intestate, during his or her natural life.

III. To the brothers and sisters of the intestate of the blood of the ancestor, whether of the whole or half blood, or their representatives.

IV. To the ancestor from whom the estate came by deed of gift, if living.

V. To the children of the ancestor from whom the estate came, or their representatives; if none, then to the husband or wife, relict of such ancestor, for life; or on his or her death, or, if there be none such, to the brothers and sisters of such ancestor, or their representatives. If none, then to the brothers and sisters of the intestate of the half blood, though such brothers and sisters be not of the blood of the ancestor from whom the estate came.

VI. To the next of kin to the intestate, of the blood of the ancestors from whom the estate came.

VII. If the estate came not by descent, devise, or deed of gift, it descends as follows: —

1. To the children of the intestate, and their representatives.
2. To the husband or wife of the intestate.
3. To the brothers and sisters of the whole blood, and their representatives.
4. To brothers and sisters of the half blood, and their legal representatives.
5. To the father; or, if the father be dead, to the mother.
6. To the next of kin to and of the blood of the intestate.

VIII. If there be no kindred, then to the surviving husband or wife as an estate of inheritance; and if there be no such relict, it escheats to the State.

IX. When the relict of a deceased husband or wife shall die intestate and without issue, possessed of any real estate or personal property which came to such intestate from any former deceased husband or wife by deed of gift, devise, or bequest, or under the provisions of rule VII., then such estate, real and personal, shall pass to and vest in the children of said deceased husband or wife, or the legal representatives of such children. If there are no children or their legal representatives living, then such estate, real and personal, shall pass and descend, one half to the brothers and sisters of such intestate, or their legal representatives, and one half to the brothers and sisters of such deceased husband or wife from which such personal or real estate came, or their personal representatives.

X. Bastards shall be capable of inheriting or transmitting inheritance from and to the mother, and from and to those from whom she may inherit, or to whom she may transmit inheritance, in like manner as if born in lawful wedlock. When a man has by a woman one or more children, and afterwards intermarries with her, such issue, if acknowledged by him as his child or children, shall be deemed legitimate; and the issue of parents whose marriage is deemed null in law shall nevertheless be legitimate.

XI. Advancements to a child or children of such intestate or their descendants must be brought into hotchpot, but in no case can the heir be obliged to refund. If any such advancement is made in real estate, the value thereof shall be considered and taken as a part of the real estate to be divided, and if in money or other personal estate, it shall be considered and taken as a part of the personal estate to be distributed; and if, in either case, it exceeds the share of the real or personal estate that would have come to the heir to whom such advancement was made, he or she shall not refund any part of it, but shall receive so much less out of the other part of the estate of the intestate, as will make his or her whole share equal, as near as can be estimated, to that of either of the other heirs who are in the same degree of consanguinity with him or her. If the value of the estate, real or personal, so advanced, is expressed in the deed of conveyance, or in the charge thereof, made by the intestate, or in the receipt in writing, given by the person receiving such advancement, it shall be considered and taken to be of that value, in the division and distribution of the estate, otherwise it shall be estimated at its value when advanced. Rev. Stat. 1896, § 4158 *et seq.*

In *Oklahoma*, estates of inheritance descend, —

I. If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leaves a surviving husband or wife, and more than one child living, or one child living, and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation. If the decedent leave no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and to the issue of the deceased child or children, by right of representation.

II. If the decedent leaves no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father. If there be no father, then one half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if he leave a mother also, she takes an equal share with the brothers and sisters. If decedent leave no issue, nor husband, nor wife, the estate must go to the father.

III. If there be no issue, nor husband, nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if a mother survives, she takes an equal share with the brothers and sisters.

IV. If the decedent leaves no issue, nor husband, nor wife, nor father, and no brother or sister is living at the time of his death, the estate goes to his mother to the exclusion of the issue, if any, of deceased brothers or sisters.

V. If the decedent leaves a surviving husband or wife, and no issue, and no father, nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife.

VI. If the decedent leaves no issue, nor husband, nor wife, and no father, nor mother, nor brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestors must be preferred to those claiming through an ancestor more remote. However :

VII. If the decedent leaves several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

VIII. If, at the death of such child who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent ; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to representation.

IX. If the decedent leaves no husband, wife, or kindred, the estate escheats to the Territory for the support of common schools.

X. Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance.

XI. The provisions respecting illegitimate children are similar to those of Nebraska.

XII. The provisions respecting advancements are similar to those in Ohio. Stat. 1893, § 6261 *et seq.*

In *Oregon*, the rules of descent are the same as in Nebraska, except that in default of issue the land goes to the wife in fee, if she is alive, if not, to the father.

Illegitimate children inherit from the mother but not through her. The mother inherits from her illegitimate child who dies without leaving widow, husband, or lawful issue. Illegitimates are legitimated by the marriage of their parents.

Degrees of kindred are computed according to the rules of the civil law, and kindred of the half blood inherit equally with those of the whole blood in the same degree.

The law as to advancements is the same as in Nebraska. Hill's Annot. Laws, 1887, § 3098 *et seq.*

In *Pennsylvania*, real estate descends, —

I. To children and their descendants, equally, if they are all in the same degree ; if not, then by representation, the issue in every case taking only such share as would have descended to the parent, if living.

II. In default of issue, then to the father and mother during their joint lives

and the life of the survivor of them; and after them to the brothers and sisters of the intestate of the whole blood, and their children by representation.

III. If there be none of these, then to the next of kin, being the descendants of brothers and sisters of the whole blood. The degrees are reckoned according to the civil law.

IV. If none of these, to the father and mother, if living, or the survivor of them in fee.

V. In default of these, to the brothers and sisters of the half blood and their children by representation.

VI. In default of all persons above described, then to the next of kin of the intestate.

VII. Before the act of April 27, 1855, no representation among collaterals was allowed after brothers' and sisters' children; but by that act it was permitted to the grandchildren of brothers and sisters, and the children of uncles and aunts.

VIII. No person can inherit an estate unless he is of the blood of the ancestor from whom it descended, or by whom it was given or devised to the intestate.

IX. In default of known heirs or kindred, the estate is vested in the surviving husband or wife.

X. In default of these, it escheats to the State.

XI. No person who is not of the blood of the ancestors or other relations from whom any real estate descended, or by whom it was given or devised to the intestate, shall, in any of the cases before mentioned, take any estate therein, but such estate shall pass to such other persons as would be entitled if the persons not of the blood of such ancestor had never existed.

XII. Advancements must be brought into hotchpot.

XIII. Illegitimates have the capacity to inherit from each other and from their mother and she from them, according to the general laws of descent, as if they had been born in lawful wedlock. Pepper & Lewis' Dig. col. 2409.

In *Rhode Island*, when any person having title to any real estate of inheritance dies intestate, such estate descends in equal portions, —

I. To his children or their descendants.

II. To the father.

III. To the mother, brothers, and sisters, and their descendants.

IV. If there be none of these, the inheritance goes in equal moieties to the parental and maternal kindred, each in the following course: —

1. To the grandfather, if there be any.

2. To the grandmother, uncles, and aunts, on the same side, and their descendants.

3. To the great-grandfathers, or great-grandfather.

4. To the great-grandmothers, or great-grandmother, and the brothers and sisters of the grandfathers and grandmothers, and their descendants; and so on without end; passing first to the nearest lineal male ancestors, and, for want of them, to the lineal female ancestors in the same degree, and the descendants of such male and female lineal ancestors.

V. No right in the inheritance accrues to any persons whatsoever, other than to the children of the intestate, unless such persons be in being, and capable, in law, to take as heirs at the time of the intestate's death.

VI. When the inheritance is directed to go by moieties, as above, to the paternal and maternal kindred, if there be no such kindred on the one part, the

whole goes to the other part; and if there be none of either part, the whole goes to the husband or wife of the intestate; and if the wife or husband be dead, it goes to his or her kindred in the like course as if such husband or wife had survived the intestate, and then died, entitled to the estate.

VII. The descendants of any person deceased inherit the estate which such person would have inherited had such person survived the intestate.

VIII. If the estate came by descent, gift, or devise from the parent or other kindred of the intestate, and such intestate die without children, it goes to the next of kin to the intestate of the blood of the persons from whom such estate came or descended, if any there be.

In default of heirs, the estate is taken possession of by the town where it may be.

IX. Bastards inherit and transmit inheritance on the part of the mother.

X. Advancements to a child or grandchild must be deducted from the share of such child or grandchild. If real estate shall be conveyed by deed of gift, or personal estate shall be delivered to a child or grandchild, and charged, or a memorandum thereof in writing made by the intestate or his order, or shall be delivered expressly for that purpose in the presence of two witnesses, who were desired to take notice thereof, the same shall be deemed an advancement to such child to the value of such real or personal estate. Gen. Laws, 1896, cc. 216, 217.

In *South Carolina*, when any person possessed of, interested in, or entitled to any real estate in his own right, in fee-simple, dies intestate, it descends, —

I. One third to the widow in fee; the remainder to the children.

II. Lineal descendants represent their parents.

III. If no issue or lineal descendants, then one half to wife; and the other half is equally divided between father, or if he be dead, the mother, and brothers and sisters of whole blood; children of deceased brother or sister to take the share which their parent would have had; provided that there be no representations admitted among collaterals after brothers' and sisters' children. If no father or mother, the share goes as the rest is directed to be distributed in this section.

IV. If the intestate leaves no child or descendant, or brothers or sisters, of the whole blood, or their children, but leaves a widow and father or mother, the widow takes one half, and the father, or mother, the other. If he leaves no descendant, father, or mother, but a widow, and brothers and sisters of the whole blood, the widow takes one half, and the brothers and sisters the other half, children of deceased brothers or sisters taking their share.

V. If no wife, issue, nor lineal descendants, then the whole estate shall be divided equally between father; or, if he be dead, the mother and brothers and sisters of whole blood.

VI. If intestate leaves no lineal descendants, father, mother, brother, or sister, of the whole blood, but a widow and brother or sister of half blood, and a child or children of brother or sister of whole blood, widow shall take one half, and the other half shall be divided equally between brothers or sisters of half blood, and children of brothers and sisters of whole blood; the children of every deceased brother or sister of whole blood taking among them a share equal to the share of a brother or sister of half blood. If there be no brother or sister of half blood, then half the estate shall descend to child or children of deceased brother or sister; and if there be no children of deceased brother or sister of whole blood, then said half shall go to brothers and sisters of half blood.

VII. If none of these, then widow shall take one half, and other half to lineal ancestors.

VIII. If none of these, then widow takes two thirds, and residue goes to next of kin.

IX. Degrees of kindred are computed by beginning with the intestate, reckoning up to the common ancestor and down to the claimant, inclusively, each step being a degree.

X. If there is no widow, her share goes as is provided in the preceding clauses for the rest of the estate.

XI. On the decease of the wife, the husband takes the same share in his wife's estate that she would have taken in his had she survived him ; and the remainder goes in the same manner as described in case of the intestacy of a married man.

XII. If there is no husband, his share goes as is provided in the preceding clause for the rest of the estate.

XIII. If there be no issue, parent, nor brother nor sister of the whole blood, nor their children, nor brother nor sister of the half blood, nor lineal ancestor, nor next of kin, the whole goes to the surviving husband or wife.

XIV. Advancements to a child or issue must be brought into hotchpot by the person advanced or his legal representatives, and the value thereof is to be estimated at the death of the ancestor, but so that neither the improvements of the real estate by such child or children, nor the increase of the personal property, shall be taken into computation. 1 Rev. Stat. 1893, § 1980 *et seq.*

In *South Dakota*, the rules of descent are the same as in North Dakota, except that rule II. of North Dakota is changed to read as follows : —

If the decedent leave no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father. If there be no father, then one half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation : if he leaves a mother also, she takes an equal share with the brothers and sisters. If decedent leave no issue, nor husband nor wife, the estate must go to the father. If the decedent leave a surviving husband or wife, and no issue, and no father, nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife.

To the 3d North Dakota rule is added the following : —

If a mother survive, she takes an equal share with the brothers and sisters. Annot. Stat. 1899, § 4590 *et seq.*

In *Tennessee*, the land of an intestate descends, —

I. Without reference to the source of his title, —

1. To all the sons and daughters equally, and to their descendants by right of representation.

2. If there be none of these, and either parent be living, then to such parent.

II. If the estate was acquired by the intestate, and he died without issue, —

1. To his brothers and sisters of the whole and half blood born before or after his death, and to their issue by representation.

2. In default of these, to the father and mother as tenants in common.

3. If both be dead, then in equal moieties to the heirs of the father and mother in equal degree, or representing those in equal degree, of relationship to the intestate ; but if these are not in equal degree, then to the heirs nearest in blood,

or representing those nearest in blood, to the intestate, in preference to others more remote.

III. When the land came by gift, devise, or descent, from a parent, or the ancestor of a parent, and he died without issue, —

1. If there be brothers and sisters of the paternal line of the half blood, and such also of the maternal line, then it descends to the brothers and sisters on the part of the parent from whom the estate came, in the same manner as to brothers and sisters of the whole blood, until the line of such parent is exhausted of the half blood, to the exclusion of the other line.

2. If no brothers or sisters, then to the parent, if living, from whom or whose ancestors it came, in preference to the other parent.

3. If both be dead, then to the heirs of the parent from whom or whose ancestor it came.

IV. The same rules of descent are observed in lineal descendants and collaterals respectively, when the lineal descendants are further removed from their ancestor than grandchildren, and when the collaterals are further removed than children of brothers and sisters.

V. If there be no heirs, then to the husband or wife in fee-simple.

VI. A child of color cannot inherit the estate of its mother's husband, unless the mother or husband was a person of color.

VII. A posthumous child of a testator born within ten calendar months after his death will inherit as in case of intestacy.

VIII. Illegitimate children inherit from their mother equally with her legitimate children, and should any of such children die intestate without child, his or her brothers and sisters shall take his or her estate. If an illegitimate child die without issue, husband or wife, the estate shall go first to the mother, and then equally to brothers and sisters by the mother or their descendants. If an illegitimate person die intestate leaving no relative entitled by existing laws to his estate, it shall go to such persons as would, had the testate been legitimate, have been his heirs on his mother's side as provided by existing laws of descent among legitimates who have no kin on the father's side.

IX. All advancements whether by settlement or otherwise in the lifetime of the deceased or by testamentary provision shall be collated and brought into contribution in the partition and distribution of the real and personal estate of the deceased : these in real estate, first in the partition of real estate, and those in personal estate in the distribution of the personal estate. And should the value of the advancement in real estate exceed the child's share, the overplus shall be collated and brought into contribution in the distribution of the personal estate ; and should the value of such advancements in personal estate exceed the share of such child in the personal estate, then the excess shall be brought into contribution in the partition of the real estate. Where a power or trust is granted to a parent to bestow property conveyed or settled by the instrument creating the power or trust, in favor of any one or more of the children of such parent, any property given under such power or trust to a child shall be collated and brought into contribution by such child claiming a share in the distribution of the property of the parent. Code, 1896, § 4163 *et seq.*

In *Texas*, real estate of inheritance descends, —

I. To children and their descendants.

II. To father and mother in equal portions ; but if one be dead, then one half

to the survivor, and the other to brothers and sisters and their descendants; but if there be none of these, then the whole goes to the surviving father or mother.

III. If there be neither father nor mother, then the whole to the brothers and sisters of the intestate, and their descendants-

IV. If there be no kindred aforesaid, then the estate descends in two moieties, one to the paternal and the other to the maternal kindred, in the following course : —

1. To the grandfather and grandmother equally.

2. If only one of these be living, then one half to such survivor, and the other to the descendants of the other.

3. If there be no such descendants, then the whole to the surviving grandparent.

4. If there be no such, then to the descendants of the grandfather or grandmother, passing to the nearest lineal ancestors.

V. There is no distinction between ancestral and acquired estates.

VI. If there be a surviving husband or wife, and a child or children or their issue, such survivor takes one third of the estate for life, with remainder to children or their descendants.

VII. If no issue or descendants, then the surviving husband or wife takes half the land, without remainder over; and the other half passes according to the preceding rules; but if there is neither issue, father nor mother, brother or sister, or their descendants, the whole estate goes to the surviving husband or wife.

VIII. Among collaterals, those of the half blood inherit only half as much as those of the whole blood; but if all be of the half blood, they have whole portions.

IX. If all relations are in the same degree, they take *per capita;* otherwise, *per stirpes.*

X. No conviction shall work corruption of blood or forfeiture of estate, and suicides transmit inheritance as in case of natural death.

XI. Advancements to children of the intestate or their issue must be brought into hotchpot.

XII. Where a man, having by a woman a child or children, shall afterward intermarry with such woman, such child or children, if recognized by him, shall thereby be legitimated and made capable of inheriting his estate. The issue also of marriages deemed null in law shall nevertheless be legitimate. Bastards shall be capable of inheriting from and through their mother, and of transmitting estates, and shall also be entitled to distributive shares of the personal estates of any of their kindred, on the part of their mother, in like manner as if they had been lawfully begotten of such mother. Batts' Annot. Civ. Stat. 1897, § 1688 *et seq.*

In *Utah*, real estate descends, —

I. If the decedent leave a surviving husband or wife, and only one child, or the issue of one child, in equal shares to the surviving husband or wife, and child or issue of such child. If the decedent leaves a surviving husband or wife, and more than one child living, or one child living, and the issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder

goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation.

II. If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue, and if such issue consists of more than one child living, or one child living, and the issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation.

III. If the decedent leave no issue all of the estate, real and personal, if not over five thousand dollars in value, goes to the surviving husband or wife; and if over that value, five thousand dollars in value thereof goes to the surviving husband or wife, and the excess goes one half to the surviving husband or wife, and the other half to the decedent's father and mother, in equal shares, and if either be dead, the whole of said half goes to the other. If there be no father nor mother, then one half of such excess goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother, or sister, by right of representation. If the decedent leave no issue, nor husband, nor wife, the estate must go to his father and mother in equal shares, or if either be dead, then to the other.

IV. If there be neither issue, husband, wife, father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation.

V. If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife.

VI. If the decedent leave neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote.

VII. If the decedent leave several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

VIII. If, at the death of such child who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation.

IX. If the decedent leave no husband, wife, nor kindred, and there be no heirs to take the estate or any portion thereof, the same shall escheat to the State for the benefit of the school fund.

X. Every illegitimate child is the heir of the person who acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock. The issue of all marriages null in law, or dissolved by divorce, are legitimate. If an illegitimate child dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs at law.

XI. Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance.

XII. Advancements made to any child or other lineal descendant must be brought into hotchpot, but in no case can the heir be required to refund. All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such by the child or other successor or heir. If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise, it must be estimated according to its value when given, as nearly as the same can be ascertained. If any child, or other lineal descendant receiving an advancement, dies before the decedent, leaving issue, the advancement must be taken into consideration in the division and distribution of the estate, and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement, in like manner as if the advancement had been made directly to them.

XIII. Posthumous children are considered as living at the death of their parent.

XIV. The issue of bigamous and polygamous marriages, heretofore contracted between members of the Church of Jesus Christ of Latter-day Saints, born on or prior to the fourth day of January, A. D. eighteen hundred and ninety-six, are hereby legitimated; and such issue are entitled to inherit from both parents, and to have and enjoy all rights and privileges to the same extent and in the same manner as though born in lawful wedlock. Rev. Stat. 1898, § 2828 *et seq.*

In *Vermont*, real estate descends, —

I. In equal shares to the children of such deceased person or the legal representatives of deceased children.

II. If the deceased is a married person and leaves no issue, the surviving husband or wife, as the case may be, if the husband does not elect to take the tenancy by the curtesy or the wife does not elect to take the dower, or if either waives the provisions of the will of the other, shall be entitled to the whole of the deceased's estate forever, if it does not exceed two thousand dollars. But if it exceeds that sum, then the survivor shall be entitled to two thousand dollars and one half of the remainder; and the remaining part of said estate shall descend as the whole would if the husband or wife had not survived; and if the deceased has no kindred who by law may inherit the estate, the surviving husband or wife, as the case may be, shall be entitled to the whole.

III. If the deceased leaves no issue, or surviving husband or wife, as the case may be, the estate shall descend in equal shares to the father and mother of such deceased person; and if the mother is not living the estate shall descend to the father; and if the father is not living and the mother survives, the estate shall descend to the mother.

IV. If the deceased person leaves no issue, nor wife, nor husband, nor father, nor mother, the estate shall descend in equal shares to the brothers and sisters of such deceased person, and to the legal representatives of a deceased brother or sister.

V. If none of the relatives above named survives the deceased, the estate shall descend in equal shares to the next of kin in equal degree: but no person shall be entitled by right of representation to the share of such next of kin who has died.

VI. The degrees of kindred shall be computed according to the rules of the civil law, and the kindred of the half blood shall inherit equally with those of the whole blood, in the same degree.

VII. Illegitimate children shall inherit the estate of their mothers as if born in lawful wedlock ; and the estate of an illegitimate person dying intestate, and leaving no issue, nor husband, nor wife, shall descend to the mother, and if the mother is dead, through the line of the mother as if the person so dying was born in lawful wedlock. When the parents of an illegitimate child intermarry, the child, if recognized by the father as his child, shall be considered legitimate, and be capable of inheriting.

VIII. If there is no person who can inherit, the property escheats to the town for the use of the schools.

IX. Advancements made by the intestate in his lifetime to a child or other lineal descendant must be brought into hotchpot, but in no case can the heir be required to refund. Only such gifts are advancements as are so expressed, or are for the consideration of love and affection, or when the estate so given is charged as such by the deceased in writing, or is acknowledged by the heir as such in writing, or when personal estate is delivered expressly as advancement before two witnesses requested to take notice of it. If the amount so advanced is in real estate, the same shall be set off, first, toward the heir's share of real estate, and if it is more than his share of real estate, the balance shall be set off toward his share of the personal estate ; and if the advancement is in personal estate, the same shall be set off, first, toward the heir's share in the personal estate, and then toward his share in the real estate. But if the heirs consent, a different application of the advancement may be made. If the child, or other lineal descendant to whom such advancement is made, dies before the intestate, the advancement shall be reckoned toward the share of the representative, as it would be reckoned toward the share of the heir, if living. Where the value of an advancement is expressed in the conveyance, or in the charge of the same, or in the acknowledgment of the person receiving it, or by the intestate at the time of delivering it before two witnesses, such advancement shall be taken to be of the value so expressed ; otherwise it shall be estimated according to the value at the time of making it. Stat. 1894, § 2544 *et seq.*

In *Virginia*, when a person having title to any real estate of inheritance dies intestate as to such estate, it descends, —

I. To his children and their descendants.

II. If there be none such, to the father.

III. If no father, to the mother and brothers and sisters, and their descendants.

IV. If there be none of these, then one half goes to the paternal, the other to the maternal kindred, as follows : —

1. To the grandfather.

2. To the grandmother, uncles, and aunts on the same side, and their descendants.

3. To the great-grandfathers or great-grandfather.

4. To the great-grandmothers or great-grandmother, and the brothers and sisters of the grandfathers and grandmothers, and their descendants ; and so on, passing to the nearest lineal male ancestors, and, for want of these, to the nearest lineal female ancestors in the same degree, and their descendants.

V. If there be no paternal kindred, the whole estate goes to the maternal kindred; and *vice versa.*

VI. If there be neither paternal nor maternal kindred, the whole goes to the husband or wife of the intestate; and if the husband or wife be dead, then his or her kindred take the estate, in the same manner as though they had survived the intestate and died.

VII. Collaterals of the half blood inherit only half as much as those of the whole blood; but if all the collaterals be of the half blood, the ascending kindred (if any) have double portions.

VIII. When the estate goes to children, or to the mother, brothers, and sisters, or to the grandmothers, uncles, and aunts, or to any of his female lineal ancestors, with the children of his deceased lineal ancestors, male and female, in the same degree, they take *per capita;* but if the degrees are unequal, they take *per stirpes.*

IX. Bastards inherit and transmit inheritance on the part of the mother. Bastards are legitimated by the marriage of their parents, if they or their descendants are recognized by the father after such marriage.

X. Posthumous children, born in ten months after the death of the intestate, inherit as if born at his death.

XI. Advancements to a descendant, made by a decedent in his lifetime or by will, must be brought into hotchpot with the whole estate, real and personal. Code, 1887, § 2548 *et seq.*

In *Washington*, real estate descends, —

I. If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife, and child, or issue of such child; if the decedent leaves a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child, by right of representation; if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent, they share equally; otherwise they take according to the right of representation.

II. If the decedent leaves no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father and mother, if both survive. If there be no father nor mother, then one half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brothers or sisters, by right of representation. If decedent leaves no issue, nor husband, nor wife, the estate must go to his father and mother.

III. If there be no issue, nor husband, nor wife, nor father and mother, nor either, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation.

IV. If the decedent leaves a surviving husband or wife and no issue, and no father nor mother, nor brother nor sister, the whole estate goes to the surviving husband or wife.

V. If the decedent leaves no issue, nor husband nor wife, and no father nor mother, nor brother nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote, however.

VI. If the decedent leaves several children, or one child and the issue of one or more other children, and any such surviving child dies under age, and not having been married, all the estate that comes to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

VII. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally; otherwise they take according to the right of representation.

VIII. If the decedent leaves no husband, wife, or kindred, the estate escheats to the State, for the support of common schools in the county in which the decedent resided during lifetime, or where the estate may be situated.

IX. Every illegitimate child shall be considered as an heir to the person who shall in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as heir of his mother, and shall inherit his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried, and his father, after such marriage, shall have acknowledged him as aforesaid, and adopted him into his family, in which case such child and the legitimate children shall be considered as brothers and sisters, and on the death of either of them intestate, and without issue, the others shall inherit his estate, and he theirs, as heretofore provided in like manner as if all the children had been legitimate, saving to the father and mother, respectively, their rights in the estates of all the said children, as provided heretofore, in like manner as if all had been legitimate. If any illegitimate child shall die intestate without lawful issue, his estate shall descend to his mother, or in case of her decease, to her heirs at law.

X. The degree of kindred shall be computed according to the rules of the civil law, and the kindred of the half blood shall inherit equally with those of the whole blood in the same degree.

XI. Any estate, real or personal, that may have been given by the intestate in his lifetime as an advancement to any child, or other lineal descendant, shall be considered a part of the intestate's estate, so far as regards the division and distribution thereof among his issue, and shall be taken by such child or other descendant, toward his share of the intestate's estate. If the amount of such advancement then exceed the share of the heir so advanced, he shall be excluded from any further portion of the division and distribution of the estate, but he shall not be required to refund any part of such advancement, and if the amount so received shall be less than his share, he shall be entitled to so much more as will give him his full share of the estate of the deceased. If any such advancement shall have been made in real estate, the value thereof shall, for the purposes of the preceding section, be considered as part of the real estate to be divided, and if it be in personal estate, and if in either case it shall exceed the share of real or personal estate respectively that would have come to the heir so advanced, he shall not refund any part of it, but shall receive so much less out of the other part of the estate as will make the whole share equal to those of the other heirs who are in the same degree

with him. All gifts and grants shall be deemed to have been made in advancement, if expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant. If the value of the estate so advanced shall be expressed in the conveyance, or in the charge thereof made by the intestate, or in the acknowledgment of the party receiving it, it shall be considered of that value in the division and distribution of the estate ; otherwise it shall be estimated at its value when given. If any child or lineal descendant so advanced shall die before the intestate, leaving issue, the advancement shall be taken into consideration in the division and distribution of estate, and the amount thereof shall be allowed accordingly by the representatives of the heir so advanced, as so much received towards their share of the estate, in like manner as if the advancement had been made directly to them.

XII. Posthumous children are considered as living at the death of their parents. Codes & Stat. § 4620 *et seq.*

The rules of descent in *West Virginia* are the same as in Virginia. Code, 1899, c. 78.

In *Wisconsin*, land descends, —

I. To the children in equal shares, grandchildren by a deceased child taking the share of the grandparent, by representation.

II. If there are no children surviving, then to the husband or widow surviving.

III. If no children, or husband or wife, to the parents or the surviving parent.

IV. If there are no parents, to the brothers and sisters equally, children of deceased taking by right of representation.

V. If there are none of these, to the next of kin, in equal degree, except that those claiming through the nearest ancestor shall be preferred to those claiming through one more remote.

VI. Failing surviving husband or widow and kindred, the estate escheats to the State for the benefit of the school fund.

VII. Degrees of kindred are computed according to the rules of the civil law ; and kindred of the half blood inherit equally with those of the whole blood in the same degree ; unless the inheritance came to the intestate by descent, devise, or gift from one of his ancestors ; in which case, those who are not of the blood of such ancestor are excluded.

VIII. If an illegitimate child die intestate, without lawful issue, his estate goes to his mother or her heirs at law. An illegitimate is the heir of the person who shall, in writing, signed in the presence of a witness, have acknowledged the paternity ; and is always the heir of his mother ; but he cannot inherit through father or mother by right of representation unless, before his death, his parents shall have intermarried, and his father shall afterwards have recognized him as his child, in which case he shall be thereby legitimated. The issue of all marriages declared null in law shall be legitimate.

IX. Posthumous children are considered as living at the death of their parents. Annot. Stat. 1889, § 2770 *et seq.*

In *Wyoming*, real estate shall descend as follows : —

I. One half to the surviving wife or husband, the other half to the surviving children and their descendants, by right of representation.

II. If there are no children or descendants, three fourths to the surviving

husband or wife and one fourth to the father and mother of the intestate or the survivor of them ; provided that if the estate, real and personal, does not exceed ten thousand dollars in value, and such intestate have a husband or wife, and no child or descendant, then the whole thereof shall descend to the surviving husband or wife.

III. To the children and their descendants by right of representation.

IV. To the father, mother, brothers, and sisters, and to the descendants of brothers and sisters who are dead, by right of representation, in equal parts.

V. To the grandfather, grandmother, uncles, aunts, and their descendants, by right of representation, in equal parts.

VI. Posthumous children or descendants of the intestate shall inherit in like manner as if born in the lifetime of the intestate ; but no right of inheritance shall accrue to any person other than the children or descendants of the intestate, unless they are in being and capable in law of taking, as heirs at the time of the intestate's death.

VII. Descendants of the half blood inherit the same as descendants of the whole blood ; but collateral relations of the half blood shall inherit only half the measure of collateral relatives of the whole blood, if there be any of the last named class living.

VIII. Illegitimates inherit the same as children born in wedlock, if the parents subsequently intermarry, and such children be afterwards recognized by the father to be his legitimate children [here the wording of the statute is defective], inherit from the mother and the mother from the children. A bastard intestate's property descends as follows : —

1. To the widow or surviving husband and children, as in other cases.

2. To the widow or surviving husband.

3. To the mother and her children and their descendants ; to the mother, one half, and the other half to be equally divided between her children and their descendants, by right of representation.

4. To the next of kin of the mother.

IX. In addition to the foregoing, there are rules of presumptive evidence in survivorship.

CHAPTER LXXXVI.

TITLE BY ESCHEAT.

§ 1866. Definition.
1867. Application restricted in this country.
1868. Of inquest of office.
1869. When escheated land vests in the State.
1870. State conveyance of escheated land.
1871. When State estopped to claim escheat.
1872. Escheat of equitable estates.
1873. Escheat of vested remainder.
1874. State acquires only title of former owner.

§ 1866. **Definition.** — [Strictly speaking, escheat is the means whereby the sovereign, as the original owner, regains his original estate in land granted upon feudal tenure, by reason of failure of heirs of the deceased owner, alienage, forfeiture for crime, etc.[1]] Escheat, in a feudal sense, prevailed in Maryland, and perhaps a few other of the Colonies, in their early history, but never since the Revolution. From being an incident of tenure under the feudal law, whereby, upon failure of heirs on the part of a tenant, so that the duties belonging to the estate were not performed, it fell back into the hands of the lord, it has come to be a falling of the estate into the general property of the State, either because the tenant is an alien, or because he has died intestate, without lawful heirs to take his estate by succession.[2]

§ 1867. **Application restricted in this Country.** — It was shown in a former volume of this work, that, by the legislation of most of the States, alienage has ceased to be a disability for holding lands,[3] so that the dying intestate without heirs is now practically the only ground of escheat which is worth considering; for relations succeed, however distant, provided only

[1] Bouvier's Law Dict., "Escheat."

[2] *Ante*, § 75; Matthews *v.* Ward, 10 Gill & J. 443; Sewall *v.* Lee, 9 Mass. 363; 3 Cruise, Dig. 397.

[3] *Ante*, § 132.

they give evidence of their propinquity.[1] In this case, as above stated, the property comes to the State. The English doctrine of forfeiture of lands to the State for crime, or corruption of blood, is generally, if not universally, done away with in this country,[2] and will therefore be no further noticed in this work.

§ 1868. **Of Inquest of Office.** — Considered in this light, escheated lands may be regarded as merely falling back into the common ownership of the State, from which they were, theoretically, originally derived, because the tenant did not see fit to dispose of them in his lifetime, and left no one who, in the eye of the law, has any claim to inherit them. But even in such a case, in most of the States, as well as at common law, there must be a process like a recovery of the lands by suit gone through with before the land can properly be considered as belonging to the State. This process is called in general terms an "inquest of office," sometimes "office found," being a course of legal proceedings carried on in the name of the State, under a claim that the land has escheated for want of heirs. The form of this varies in different States, being regulated by statute.[3] Land being allodial in the United States, escheat properly speaking does not apply to it, but in case of failure of heirs, in many States it goes to the State, generally for some public purpose, like school funds or hospital funds.

§ 1869. **When Escheated Land vests in the State.** — In some States it would seem, that if, upon the death of the tenant without heirs, the lands are left vacant, they are considered as vesting at once in the State.[4] In others, such is deemed to be the case if there shall have been a judgment in favor of the State, though no writ of possession shall have been executed.[5] But if the lands are in possession of a tenant, the proceedings

[1] Kaimes, Tracts, 110.

[2] 3 Greenl. Cruise, Dig. 398, note; 4 Kent, Com. 426, 428; U. S. Const. art. 3, § 3.

[3] See Sadlers' case, 4 Rep. 56; Page's case, 5 Rep. 52; People *v.* Cutting, 3 Johns. 1; Commonwealth *v.* Hite, 6 Leigh, 588; People *v.* Folsom, 5 Cal. 373; Puckett *v.* State, 1 Sneed, 355; 4 Kent, Com. 424, 425, note.

[4] Den d. Van Kleek *v.* O'Hanlon, 21 N. J. 582; O'Hanlin *v.* Den d. Van Kleeck, 20 N. J. 31; 4 Kent, Com. 424; Montgomery *v.* Dorion, 7 N. H. 475: White *v.* White, 2 Met. (Ky.) 185; Crane *v.* Reeder, 21 Mich. 80.

[5] Commonwealth *v.* Hite, 6 Leigh, 588.

must be carried on upon the same principle as between other demandants and tenants, and possession taken by service of a legal precept; and if the State fail to show that the owner died without heirs, it will fail to establish a claim, although the tenant does not claim under the deceased owner, or set up any title beyond possession.[1] The same rule prevailed in Maryland before the Revolution, in case of the lord proprietary who had the benefit of escheats. He could only reinvest himself with an estate so as to convey it by first making entry upon the land.[2] And in People *v.* Folsom, cited above, the principle is laid down as one of universal application, that neither by the civil nor common law could the king take upon himself the possession of an estate as having escheated until the fact is judicially ascertained by a proceeding in the nature of an inquest of office.[3] And in such a proceeding it has been held that the State must negative the presumption that the party dying left heirs in order to prevail.[4]

§ 1870. **State Conveyance of Escheated Land.** — Still, by the general power which the State has as sovereign, it is no objection to its making a legislative grant of escheated land for want of heirs that this is done before proceedings actually had in office found.[5]

§ 1871. **When State estopped to claim Escheat.** — But a State may be estopped by its own grant and warranty, like an individual, even from claiming land as having escheated where the claim is made on the ground of alienage. Thus, where the Commonwealth granted lands to an alien who died leaving heirs, citizens and residents of France, to an inquest of office for recovering the lands, it was held, that the deed and warranty of the Commonwealth was a bar, and that it could not take advantage of the alienage of the heirs.[6] This right of escheat, where an owner died without heirs, was claimed by the Colonies of Massachusetts and Plymouth as incident to the

[1] Commonwealth *v.* Hite, 6 Leigh, 588; People *v.* Cutting, 3 Johns. 1; Catham *v.* State, 2 Head, 553.

[2] Kelly *v.* Greenfield, 2 Harr. & M'H. 121.

[3] Atty.-Gen. *v.* Folsom, 5 Cal. 373; Puckett *v.* State, 1 Sneed, 355.

[4] Hammond *v.* Inloes, 4 Md. 138.

[5] Colgan *v.* McKeon, 24 N. J. 566.

[6] Commonwealth *v.* André, 3 Pick. 224.

sovereignty which they exercised over the lands within their patents.[1]

§ 1872. **Escheat of Equitable Estates.** — While escheat was regarded as an incident of feudal tenure, it did not extend to the equitable estates of *cestuis que trust.* And, by analogy, it was the English rule that if a *cestui que trust* dies intestate, without heirs, the trust fails, and the trustee holds an absolute estate in the property, free from the claim of any one.[2] But it is settled by the courts of Maryland, and intimated by Judge Kent, in respect to New York, that such would not be the case under the statute of these States, and that, if a *cestui que trust* should die without heirs, his equitable estate would escheat to the State.[3] And in England, by 47 & 48 Vict. c. 71, an equitable interest in a corporeal hereditament escheats to the crown upon failure of heirs.[4]

§ 1873. **Escheat of Vested Remainder.** — A vested remainder in fee, dependent on an estate for life, may escheat before the death of the tenant for life.[5]

§ 1874. **State acquires only the Title of Former Owner.** — The principle seems to be a universal one, that, if land escheats to the State, the latter takes the title which the party dying had, and none other. It takes it, moreover, in the plight, and acquires it to the extent, to which the proprietor held it;[6] and an "escheat grant," as it is called, passes the estate just as the original grantee held it, with all privileges and appurtenances, and subject to all liens and incumbrances.[7]

[1] 3 Dane, Abr. 140.

[2] Hill, Trust. 270; Matthews *v.* Ward, 10 Gill & J. 443; 4 Kent, Com. 426; *ante*, § 1451.

[3] Matthews *v.* Ward, 10 Gill & J. 443; 4 Kent, Com. 426; Hill, Trust. 270, Whart. note; Wood *v.* Mather, 38 Barb. 479.

[4] *In re* Wood, L. R. 2 Ch. Div. (1896) 596.

[5] People *v.* Conklin, 2 Hill, 67.

[6] 4 Kent, Com. 427.

[7] Casey *v.* Inloes, 1 Gill, 430.

CHAPTER LXXXVII.

TITLE BY EMINENT DOMAIN.

§ 1875. Definition.

§ 1875. **Definition.** — Title by eminent domain is the means whereby the State acquires an estate in the land of the subject, which is needed for public uses, upon making just compensation therefor.[1] This power is inherent and may be exercised not only for the acquisition of ownership by the State itself, but on behalf of corporations carrying on enterprises of a public nature, e. g. railroads.[2] This, however, is the limit; for the power cannot be exercised on behalf of a private person or of a corporation carrying on a strictly private enterprise.[3]

But as the object of our investigations into the matter of title is intended to be restricted to the mode in which title to real property may be acquired by individuals, and of such titles as one may part with to another, rather than of the relations of the State to individuals in respect to the power which the former may exercise over the property and possession of the latter, it is not proposed to consider further the right of eminent domain as a means of appropriating the lands of the citizen for public uses, such as highways and the like. Nor is it proposed to add to what has already been said of acquiring an involuntary easement by one citizen in the lands of another, under what are called the Mill Acts, or statutes authorizing a mill-owner, under certain circumstances, to occupy the land of another for the purposes of raising a pond of water to work a water-mill.

[1] Haskell *v.* New Bedford, 108 Mass. 208; Moose *v.* Carson, 104 N. C. 431; s. c. 10 S. E. Rep. 689.

[2] Hooker *v.* N. H. & N. Co., 14 Conn. 146.

[3] Wilkinson *v.* Leland, 2 Pet. 627.

CHAPTER LXXXVIII.

TITLE BY OCCUPANCY.

§ 1876. Definition.

§ 1876. **Definition.** — The word "occupancy" is here used in a technical sense, and does not extend to titles gained by possession or prescription. It was applied only to cases where one was tenant *per auter vie*, and the *cestui que vie* outlived him. The estate here was a freehold, and therefore did not go, like a term of years, to his personal representatives. But not being one of inheritance, it did not go to his heirs; nor had the grantor or lessor any right to enter until the *cestui que vie* died. And the consequence was, that no one had any legal right to the remnant of the estate; and whoever first occupied it acquired such a title by possession that no one might displace or dispossess him. This was called a title by occupancy. It took two forms, one called a general, the other a special occupancy, according to the circumstances under which the tenant entered and took possession. But the learning on this subject has now become obsolete through legislation, both in England and in this country, whereby such an interest as the tenant *per auter vie* leaves by dying before him, by whose life his estate is measured, descends or is distributed as real estate, or as a chattel interest, like his other property.[1]

[1] See *ante*, § 234; 2 Bl. Com. 258.

CHAPTER LXXXIX.

TITLE BY PRESCRIPTION.

§ 1877. Distinction between prescription and limitation.
1878. Force of the presumption.
1879. Changes in the period of prescription.

§ 1877. **Distinction between Prescription and Limitation.** — Another mode, source, or evidence of title, familiarly known to the law, is *prescription*. Technically and properly, the term applies only to incorporeal hereditaments, and does not extend to land or corporeal property,[1] although Mr. Cruise has devoted an entire chapter to titles to land acquired by possession, under the head of prescription. This he was led to do from the analogy between the rules as to limitation of time during which the enjoyment of either furnishes conclusive evidence of title, independent of any formal evidence of an original deed or grant. The difference, however, between them consists in this, that the common law fixes what length of enjoyment of an incorporeal hereditament, like a way, a watercourse, and the like, shall be deemed sufficient evidence of an ownership of the right; while, as to the land, the period is fixed by statute, and is called a limitation, beyond which no man may set up a title adverse to the presumed title of him who has been permitted for that length of time to enjoy uninterrupted possession of the same. The matter is regulated in England by statute 3 & 4 William IV. c. 71. And, in the United States, grants of incorporeal hereditaments are presumed, upon proof of an adverse enjoyment which has been exclusive and uninterrupted for twenty years, or the period of time fixed by the respective statutes of the several States as the

[1] Crabb, Real Prop. 1039; Ferris *v.* Brown, 3 Barb. 105.

limitation in respect to lands themselves.[1] And in order to be adverse, the possession must be under a claim of title.[2]

§ 1878. **Force of the Presumption.** — The enjoyment of an incorporeal hereditament in the manner above mentioned, for the requisite period of time, raises a conclusive presumption of a grant or a right, as the case may be, which is to be applied as a *presumptio juris et de jure*, wherever a right may be acquired, in any manner known to the law.[3] But, in order that the enjoyment of an incorporeal hereditament should be the ground of anything more than a presumption of fact, as distinguished from a presumption *juris et de jure*, it must appear that all the requisites of a *prescription* apply to the particular case in question; namely, it must have been continued a sufficient length of time, adverse, under a claim of right, exclusive, continuous, and uninterrupted, and with the knowledge and acquiescence of the owner of the estate, in or over which, it is claimed, and while such owner was able, in law, to resist such enjoyment if not well founded.[4]

§ 1879. **Changes in the Period of Prescription.** — This subject is examined and discussed by Wilde, J., in Coolidge *v.* Learned.[5] The limit of prescription was originally fixed to conform to the limitation of a writ of right. This period was fixed at sixty years by the act of 32 Henry VIII. A corresponding change, however, in the period of prescription, was not adopted by the English courts. But the necessity of some limitation was supplied, by allowing a jury to presume a grant after a long period of enjoyment of an incorporeal right affecting the lands of another; and twenty years was the time fixed, in analogy with the rule of law as to the limitation of a possessory action to recover the land itself.[6] The term of time requisite

[1] 2 Greenl. Ev. § 539; 3 Kent, Com. 442; Arnold *v.* Foot, 12 Wend. 330; Ford *v.* Whitlock, 27 Vt. 265; Hart *v.* Vose, 19 Wend. 365.

[2] Adams *v.* Guice, 30 Miss. 397; Harvey *v.* Tyler, 2 Wall. 349; Kincheloe *v.* Tracewells, 11 Gratt. 605; Wallace *v.* Fletcher, 30 N. H. 446; Hall *v.* McLeod, 2 Met (Ky.) 98; Parker *v.* Foote, 19 Wend. 309, 315; Washburn, Easements (3d ed.), 114.

[3] 2 Greenl. Ev. § 539; Tyler *v.* Wilkinson, 4 Mason, C. C. 402.

[4] Washb. Ease. (3d ed.) 111, 130, 131.

[5] Coolidge *v.* Learned, 8 Pick. 508.

[6] Stodder *v.* Powell, 1 Stew. (Ala.) 287; Sims *v.* Meacham, 2 Bail. 101;

to raise a right by prescription, therefore, becomes unimportant in the practical working of the modern rule of presumption as to a grant. But still there is in respect to incorporeal hereditaments a title by prescription. In Massachusetts, when Coolidge *v.* Learned was decided, sixty years seems to have been assumed as the period of such prescription. But since that time, it has been reduced to twenty years, in analogy with the limitation of all real actions.[1] It had, in the mean time, been reduced from sixty to forty years, by applying the same analogy, in the cases of Melvin *v.* Whiting[2] and Kent *v.* Waite.[3] For the various State statutes, see *post*, note at the end of chapter xciv.

For the nature of easements, and the mode of acquiring and losing them, the reader is referred to what has already been said (*ante*, ch. liv.) upon that subject, as it seems unnecessary to pursue the subject of prescription in this connection further.

Bolivar Mg. Co. *v.* Neponset Mg. Co., 16 Pick. 247 ; Pue *v.* Pue, 4 Md. Ch. Dec. 386 ; Watkins *v.* Peck, 13 N. H. 360.

[1] Dana *v.* Valentine, 5 Met. 14 ; Luther *v.* Winnisimmet Co., 9 Cush. 171.

[2] Melvin *v.* Whiting, 10 Pick. 295.

[3] Kent *v.* Waite, 10 Pick. 138, 142.

CHAPTER XC.

TITLE BY ACCRETION.

§ 1880. Definition.
1881. Application of the doctrine.
1882. Islands — *Filum aquæ*.
1883. Same subject, continued.
1884. Accretions on the seashore.
1885. Accretions in navigable streams and lakes.
1886. Avulsion.
1887. Conveyances.

§ 1880. **Definition.** — Another mode of acquiring title to realty is where portions of the soil of real estate are added by gradual deposition, through the operation of natural causes, to that already in possession of the owner.[1] And this is called title by *accretion*.

§ 1881. **Application of the Doctrine.** — Thus kelp and other marine plants, when detached from the bottom of the sea and thrown on the shore, or beach, become vested in the owner of the soil. But, to become so, they must be cast upon the shore, and rest there, so as to become attached to the soil.[2] Such is the case where land has been formed upon and united with the shore of the sea or of a river, by the gradual formation of what is called *alluvion*, through the action of the water in washing it against the land forming such shore, and depositing it thereon. The doctrine of alluvion does not apply to any structure within the water, or filling in of earth in front of land bordering upon the water, done by some other than the owner of the land.[3] Alluvion implies soil, earth of a substan-

[1] Bracton, 9, Coxe's ed.; Güterbock, Bract. 104. Dower may be claimed by a widow in accretions to the land of her deceased husband, existing at his death. Gale *v.* Kinzie, 80 Ill. 132.

[2] Anthony *v.* Gifford, 2 Allen, 550; Emans *v.* Turnbull, 2 Johns. 322; Mather *v.* Chapman, 40 Conn. 382, 385; Bagott *v.* Orr, 2 Bos. & P. 472.

[3] Austin *v.* Rutland R. R. Co., 45 Vt. 246. As where land is filled in by a city.

tial character, which makes a permanent addition to the land by imperceptible accretion. Kelp thrown upon the shore is not, in itself, alluvion, though it is the property of the land-owner as first occupant of it. It may become alluvion by receiving and retaining the suspended particles of the abraded shore.[1] Sometimes the operation of streams of water flowing between lands of adjacent owners is to wash away the soil on one side, and deposit it upon the other. Sometimes, by the ordinary operation of natural laws, islands are formed in the sea, which become capable of occupation. It takes the character of an island if the water of the stream flows around it at the ordinary stage of the water.[2] In other cases they are formed in rivers between the adjacent banks thereof.

§ 1882. **Islands — Filum Aquæ.** — The rules which ordinarily govern such cases seem to be these: If islands are formed in the sea, or, as a general proposition, in *navigable* rivers, they belong to the sovereign or the State. But alluvion becomes, as fast as formed, the property of the owner of the land upon which it forms; and the same rule applies to islands formed in unnavigable streams, or those in which the tide does not ebb and flow. If one owns a narrow strip along a river cut off from the body of the original tract, the alluvion belongs to such narrow strip to which it is attached.[3] In respect to lands thus situated, the thread or centre line of the stream forms the dividing-line between the different owners upon the one side and the other of such stream; and whether islands formed in such streams belong to one or the other proprietor, or in part to one and in part to the other, depends upon their situation in relation to this line. If it forms upon both sides of such line, what would have been the original *filum aquæ* of such stream will divide to each owner his several share of such

Alleghany City *v.* Moorehead, 80 Penn. St. 118, 138; Sage *v.* New York, 154 N. Y. 61; s. c. 47 N. E. Rep. 1096.

[1] Church *v.* Meeker, 34 Conn. 432, 433; Phillips *v.* Rhodes, 7 Met. 323.

[2] Stover *v.* Jack, 60 Penn. St. 342.

[3] Saulet *v.* Shepherd, 4 Wall. 508; Banks *v.* Ogden, 2 Wall. 57, 69; Granger *v.* Swart, 1 Woolw. C. C. R. 88; Warren *v.* Chambers, 25 Ark. 120, where the doctrine was applied to the border of a lake not navigable. And as the right depends upon actual contiguity of the accretion to the shore, a person who is not a riparian owner cannot claim by accretion. Bristol *v.* Carroll County, 95 Ill. 84; *Re* State Reservation Comm'rs, 37 Hun, 537.

island. It often happens, by the gradual wearing away of the land upon one side, and a deposition of the soil upon the other, that this thread of the stream undergoes a constant process of change in one direction or the other, since it is the thread, for the time being, and not the one existing at the time at which the adjacent owners acquire their titles, which forms the boundary-line between their estates. But, in such cases, the owner of the land bordering upon a river may *rubble* his bank, so as to prevent the water from washing off his soil; but he cannot build anything into the stream which shall change the current of it in order to protect his own land.[1] If, however, by some sudden convulsion of nature, or by some unusual change in the course of a stream by an extraordinary flood, the effect is to leave a body of the land of one annexed to that of the other without any intervening current of water, this rule, as to the thread of the stream forming the boundary between them, ceases to apply, and the former dividing-line continues, although one of the proprietors may thereby include the whole stream within his own limits.[2]

§ 1883. **Same Subject.** — The doctrine above stated was applied to the accretion which formed along the *quai* at New Orleans, upon the bank of the Mississippi, which had been dedicated to public use. The alluvion was held to have become a part of the public quay.[3] But if land of a private owner runs down to a river, without any intervening public way along the shore, such owner will have the accretion to the bank as an incident to the ownership of the bank or shore.[4] But the case of Trustees, etc. *v.* Dickinson presents questions of more difficulty, and some of which can hardly be said yet to be

[1] Gerrish *v.* Clough, 48 N. H. 9; Menzies *v.* Breadalbane, 3 Bligh, N. S. 414, 422.

[2] 2 Sharsw. Bl. Com. 261, n.; Walk. Am. Law, 319; Ingraham *v.* Wilkinson, 4 Pick. 268; 3 Kent, Com. 428; Deerfield *v.* Arms, 17 Pick. 41, where the whole subject is learnedly examined, and a rule prescribed for dividing alluvion between adjacent riparian proprietors; Woodbury *v.* Short, 17 Vt. 387; Hargr. Law Tracts, 5; Woolrych, Laws of Water, 26, 37; Vinnius, Comm. lib. 2, tit. 1, § 20, "*De Alluvione;*" King *v.* Yarborough, 3 Barn. & C. 91, 107; Hale, *de Jure Maris*, as given in 6 Cow. 537; Fleta, B. 3, c. 2, § 6; Spigener *v.* Cooner, 8 Rich. Law, 301; Erskine's Inst. 175.

[3] New Orleans *v.* United States, 10 Pet. 717.

[4] Schools *v.* Risley, 10 Wall. 91.

settled. It was the case of a parcel of land which had formed in what was once the bed of Connecticut River, in consequence of a change in the current of the stream. The plaintiffs owned land on the east side of the river, across which the stream gradually formed a channel so as to cut off a point of their land, forming it into an island, which, as far as it extended, formed the west bank of the stream. In the mean time, land formed at points in the old bed of the stream between this island and the former west bank of the stream. The question was, whose was the land thus gradually formed in the old bed of the stream. It was held that each proprietor originally owned to the thread of the river, and, as such, became entitled to all accessions. If an island forms on one side of the thread of the stream, it will wholly belong to him who owns the land on which it formed. If it forms partly on each side of the original thread, that will divide its ownership. This thread may be changed towards one side or the other of the stream by gradual accretion upon the one shore or the other, forming a new shore-line ; and if the opposite bank be also worn away, the thread will change accordingly. When an island forms in the bed of the stream, so that the water flows upon both sides of it, it becomes two streams in that place, each having a *filum aquæ*.[1] And it is suggested, that as this island acquires by occupation the properties of land, if another island were to form between it and the mainland, the question of ownership thereof would depend upon where the new *filum aquæ* would be in respect to it. If an island in a stream be wholly washed away, the *filum aquæ* may run along where there had been this solid ground. Where the stream in its change cuts off a part of the land upon one side of the river, and leaves it upon the opposite side of the stream, the original owner of that land retains the property in it; and if the old bed of the stream between that and its former opposite bank becomes dry land, it will belong to the respective owners as before by a division formed by the old *filum aquæ* of such bed. Above a line drawn across the stream at the head of this island, the original *filum aquæ* of the stream remains as it was before. And if alluvion forms upon the upper part of this island, in the

[1] Stolp *v.* Hoyt, 44 Ill. 220.

up-stream direction, the ownership of that alluvion would be governed by the still existing *filum aquæ*. If upon both sides, each would own accordingly; if wholly upon one side or the other, the one or the other owner would be entitled to it in severalty. The *filum aquæ* is the middle line between the shores, irrespective of the depth of the channel, taking it in the natural and ordinary stage of water at its medium height, neither swollen by freshets, nor shrunk by drought. In dividing the lands laid bare in the old bed, in the case supposed, among the several owners upon the original shore, on either side, each would have a line on the original *filum aquæ*, proportioned to the line of his land upon the shore before the river was filled up, as defined in the case of Deerfield *v.* Arms.[1]

§ 1884. **Accretions on the Seashore.** — In respect to alluvion formed upon the seashore, the "shore," in the first place, is the space between high and low water marks occasioned by the ebb and flood of the tide. And the standard or test of this is "the line of the medium high tide between the spring and the neaps."[2] In respect to land along the shore gained by gradual accretion, as distinguished from some sudden acquisition, it belongs to the owner of the land upon which it forms.[3] When the sea retreats suddenly, and leaves a tract of land uncovered, the same belongs to the crown or the State.[4] The test of what is gradual, as distinguished from what is sudden, seems to be, that though witnesses are able to perceive, from time to time, that the land had encroached upon the sea-line, it is enough if it was done so that they

[1] Hopkins Acad. *v.* Dickinson, 9 Cush. 544; Deerfield *v.* Arms, 17 Pick. 41. See Dig. 41, 1; 56, 1; and 64, 3; Primm *v.* Walker, 38 Mo. 99; Batchelder *v.* Keniston, 51 N. H. 496, 498.

[2] Atty.-Gen. *v.* Chambers, 4 De Gex, M. & G. 206, 216, 218; s. c. 4 De Gex & J. 58; Scratton *v.* Brown, 4 Barn. & C. 495.

[3] The increase of land adjacent to the seashore, derived from alluvial deposits so gradually that the accretion could not be observed while actually going on, although visible from year to year, belongs to the owner of the land bounded upon the sea. Camden & Atl. Land Co. *v.* Lippincott, 45 N. J. L. 409. So held of accretion by sand being washed up on a beach. Ibid. In Louisiana, no private title is recognized to accretions from the sea. Zeller *v.* Southern Yacht Club, 34 La. Ann. 837.

[4] Emans *v.* Turnbull, 2 Johns. 322.

could not perceive the progress at the time it was being made. Nor does it make any difference in the rights of the land-owner that the accretion upon his land is the result of artificial causes, and not wholly from natural ones. The consequence is, the boundary-line of an owner's land bordering upon the sea varies with the gradual increase or diminution of quantity by the addition of alluvion, or by the encroachments of the water upon the land, the line of the shore varying accordingly.[1]

§ 1885. **Accretions in Navigable Streams and Lakes.** — Islands forming in navigable streams belong to the State.[2] But riparian accretions, whether by the deposit of alluvion or the gradual recession of the shore-line by subsidence of the water, belong to the riparian owner.[3] The sudden change of the course of a navigable river will not give the former riparian proprietors title to the old bed;[4] and the same principles apply to navigable lakes, the title to land formed by reliction being determined by the gradual or sudden recession of the water.[5] And where a lake was suddenly drained by a river cutting into it, there was no change in the title to the bed.[6] The accretion, to give title, must be gradual, so that filling out from the shore of a navigable river would not give title to the made land.[7]

§ 1886. **Avulsion.** — Cases sometimes occur where considerable quantities of soil are by the sudden action of water taken from the land of one, and deposited upon or annexed to the land of another. The difference between *avulsion*, as the latter process is called, and *alluvion*, consists in the one being done by imperceptible loss from the land of one, and

[1] Atty.-Gen. *v.* Chambers, 4 De Gex & J. 55, 69, 70; King *v.* Yarborough, 1 Dow & C. 178, 186, 189; s. c. 3 Barn. & C. 91, 105, 106; Scratton *v.* Brown, 4 Barn. & C. 485, 498; *Re* Hull, etc. R. R., 5 Mees. & W. 328; County of St. Clair *v.* Lovingston, 23 Wall. 46; s. c. 64 Ill. 56; Chic. Dock, etc. Co. *v.* Kinzie, 93 Ill. 415; New Orleans *v.* United States, 10 Pet. 662; Camden & Atl. Land Co. *v.* Lippincott, 45 N. J. L. 410.

[2] Wallace *v.* Driver, 61 Ark. 429; s. c. 33 S. W. Rep. 641.

[3] Cooley *v.* Golden, 117 Mo. 33; s. c. 23 S. W. Rep. 100.

[4] Cooley *v.* Golden, *supra*.

[5] Fuller *v.* Shedd, 161 Ill. 462; s. c. 44 N. E. Rep. 286; Warren *v.* Chambers, 25 Ark. 120.

[6] Noyes *v.* Collins, 92 Iowa, 566; s. c. 61 N. W. Rep. 250.

[7] Saunders *v.* N. Y. C. & H. R. R. Co., 144 N. Y. 75; s. c. 38 N. E. Rep. 992.

increment to that of the other; and in the other, its being done suddenly to an extent which can be ascertained and measured. In the case of avulsion, the soil still belongs to the first owner, unless he shall have suffered it to remain in its new position until it cements and coalesces with the soil of the second owner; in which case the property in the soil will be changed, and no right to reclaim it remain.[1]

§ 1887. **Conveyances.** — It is held that if land is conveyed, bounding upon the shore-line of a navigable body of water, or upon storm-tide line, or by similar phrases, the deed will carry accretions, and will cover all land to the shore-line.[2] But in Louisiana it is held that if the accretion exists and is capable of ownership at the time of the conveyance, and the conveyance bounds by a fixed line, as by the levee, the accretion outside the levee will not pass unless mentioned.[3]

[1] Woodbury *v.* Short, 17 Vt. 387; Woolrych, Law of Waters, 28, 37; Ang. Waterc. § 60; Institute, B. 2, tit. 1, § 21, and Vinnius, Comm. on the same; Fleta, B. 3, c. 2, § 6; Dikes *v.* Miller, 24 Tex. 424, 425; Hawkins *v.* Barney, 5 Pet. 467.

[2] Chic. Dock, etc. Co. *v.* Kinzie, 93 Ill. 415; Camden & Atl. Land Co. *v.* Lippincott, 45 N. J. L. 409.

[3] Ferrière *v.* New Orleans, 35 La. Ann. 209.

CHAPTER XCI.

TITLE BY ABANDONMENT.

§ 1888. Applies only to easements and incorporeal hereditaments.

§ 1888. **Abandonment only applies to Easements and Incorporeal Hereditaments.** — [Title to land cannot be lost by abandonment, notwithstanding the dictum of one learned judge to the contrary.[1] In all cases where the courts have spoken of abandonment of title to land, it will be found that the facts have raised an estoppel to assert title. These cases are treated under the head of title by estoppel. But it is otherwise of easements and incorporeal hereditaments. Title in one man is destroyed by abandonment; but no title can be said to be vested thereby in another, except in so far as the owner of the servient estate, by the destruction of the servitude, acquires the right to enjoy his land free from the burden. In a former part of this work we pointed out the circumstances under which servitudes would be considered abandoned.[2] It is a question of present intention. Mere non-user for any length of time will not amount to abandonment.[3] The owner of the servitude must expressly or impliedly have allowed the owner of the servient estate to enjoy his land in such a manner and under such circumstances that a re-establishment of the user would be unjust; or he must by some act of his own have destroyed the servitude, or he must otherwise have evinced a present intention to abandon.] The case of Corning *v.* Gould, cited in a former part of this work, was that of a way for the use of two adjacent owners, and lying along the division-line between them. One party having built upon his half of the way, which was followed by an obstructing of the other half

[1] Holmes *v.* Railroad, 8 Am. Law Reg. 716.

[2] *Ante*, § 1276.

[3] Ward *v.* Ward, 14 Eng. L. & Eq. 414; McKee *v.* Perchment, 69 Penn. St. 349.

by the other owner, the court held that this was an abandonment of the easement, the act of the first having been assented to by the owner of the other portion of the way. In commenting upon the law of the case, the court say: "Even a rent raised by deed may be extinguished in this way by mutual consent. The lessor enters and expels the tenant: if he does not choose to re-enter, the rent is gone; though, if he return, it is suspended only during the expulsion."[1] A similar doctrine of abandonment of an easement without deed, by the act of an owner exchanging one way, for instance, for another, is sustained, in the case of Pope *v.* Devereux.[2] In the case of Taylor *v.* Hampton, the right was that of one man to flow the land of another for the working a mill, where the owner of the mill had taken it down, opened the gates, and drawn down the water, and rebuilt the mill farther up stream, leaving the land between the two sites unflowed. He afterwards, in about nine years, undertook to rebuild on the original site, and it was held he had abandoned the right by what he had done. The court speaks of the loss of such an easement "by abandonment of that part of the estate which owes the servitude," and as illustrations of what are such acts of abandonment as operate to discharge the servitude, without the necessity of any formal release, mentions a removal of the gates, and a ceasing to flow a pond of water for a mill; the erection by the owner of a wall, so as to obstruct the light and air from his own window; or his building a house across a private way which leads from the street across his own land and over the land of another, whereby its original use was destroyed. Any of these or similar acts may operate as an abandonment and total loss of the easement, or a suspension thereof, as the case may be, and a consequent loss for the time being of the right to enjoy it.[3]

[1] Corning *v.* Gould, 16 Wend. 531; *ante*, § 1276.

[2] Pope *v.* Devereux, 5 Gray, 409. See this case considered *ante*, § 1275; Smith *v.* Barnes, 101 Mass. 278.

[3] Taylor *v.* Hampton, 4 McCord, 96; Owen *v.* Field, 102 Mass. 90.

CHAPTER XCII.

TITLE BY ESTOPPEL — ESTOPPEL IN PAIS.

§ 1889. What title by estoppel is.
1890. Basis of estoppels.
1891. An estoppel gives no one an estate.
1892. Of estoppel against the State.
1893. Classification.
1894. Elements of an estoppel.
1895. Illustrations — Boundary-lines.
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1897. Where both parties have equal means of knowledge.
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1899. Misrepresentation must have misled.
1900. Misrepresentation must have induced the other to act to his injury.
1901. Of the intention to deceive.
1902. There must be intent to influence action.
1903. Fixing boundary-lines by estoppel.
1904. Distinction between estoppel and limitation.
1905. Dedications to public and charitable uses.
1906. Arbitrament and award.
1907. Destruction and re-delivery of deeds.
1908. Purchaser under executory contract.
1909. Landlord and tenant — Mortgagor and mortgagee.
1910. As between grantor and grantee.
1911. Married women and infants.
1912. Who bound by estoppel *in pais*.

§ 1889. **What Title by Estoppel is.** — Title by estoppel is a means by which one practically acquires the title to an estate in land by reason of the fact that the owner thereof is precluded from showing the true state of the title. This happens when equity, and in some cases the law, in order to accomplish the purposes of justice which cannot be otherwise reached, draws certain conclusions from the acts of one party in favor of another, in respect to the ownership of lands, which it does not allow the first to controvert or deny. Estoppels differ from evidence, in that the former are received as conclusive, and preclude all inquiry as to the true merits of the title; while

the latter is merely the medium of establishing facts which do exist or have existed.[1] An estoppel against an estoppel sets the matter at large, so that a warranty opposed to a warranty leaves the matter as if none had been made.[2]

§ 1890. **Basis of Estoppels.** — The learning of estoppels is founded, as a general principle, on the idea that a man shall not defeat his own act, or deny its validity to the prejudice of another. If a man of the name of John prepare and sign a deed as William, he shall not aver that his name is not William, in order to avoid it.[3] So where a man in his deed recites particular facts, these facts become evidence against him, and he will not be at liberty to deny the truth of his statement. One who makes a feoffment cannot aver that his feoffee has not a seisin, or set up a title acquired subsequent to the feoffment.[4]

§ 1891. **An Estoppel gives no one an Estate,** technically speaking; nor does it divest another of an estate or interest in lands. It merely binds the interest by a conclusion which precludes the parties, between whom it is made to operate, from asserting or denying the state of the title.[5] Or, in the language of another, "a title is rather presumed than acquired by estoppel, inasmuch as a person is concluded by his own act from disputing the title of another."[6]

§ 1892. **Of Estoppel against the State.** — The authorities are not uniform upon the question whether or not an estoppel bars the State as it does an individual, but the better opinion seems to be that it does.[7]

§ 1893. **Classification.** — Estoppels divide themselves into (I.) those by act, called equitable estoppels or estoppels *in*

[1] Prest. Abst. 421; Crabb, Real Prop. 1046; Co. Lit. 352 *a*, and note 306; Welland Canal Co. *v.* Hathaway, 8 Wend. 480; Shep. Touch. Prest. ed. 53. But estoppels are not entitled to any peculiar favor. Hanrahan *v.* O'Reilly, 102 Mass. 204.

[2] Kimball *v.* Schoff, 40 N. H. 197.

[3] *Post*, § 2116.

[4] 2 Prest. Abst. 407, 408; Sinclair *v.* Jackson, 8 Cow. 586, by Jones, Ch.; Douglass *v.* Scott, 5 Ohio, 199.

[5] 1 Prest. Abst. 420; 2 id. 205.

[6] Crabb, Real Prop. 1046. See 2 Smith, Lead. Cas. (5th Am. ed.) 642, for American cases.

[7] Indiana *v.* Milk, 11 Biss. C. C. 197; Com. *v.* André, 3 Pick. 224; Carver *v.* Astor, 4 Pet. 1, 87. *Contra*, People *v.* Brown, 67 Ill. 435; Alexander *v.* State, 56 Ga. 478.

pais; and (II.) those by deed; and may be so considered in their bearing upon the question of title to lands. The estoppels treated in this chapter are those *in pais*.

§ 1894. **Elements of an Estoppel.** — "As a general rule, a party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter."[1] "To establish an estoppel *in pais*, it must be shown, 1. That the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct inconsistent with the title he proposes to set up. 2. That the other party has acted upon or been influenced by such act or declaration. 3. That the party will be prejudiced by allowing the truth of the admission to be disproved."[2]

§ 1895. **Illustrations — Boundary-lines.** — Thus, where A was about to purchase a lot of land which adjoined B's, and was bounded by it, and, not knowing the boundary-line, applied to B to point it out to him, who did so, knowing that the inquiry was made with a view to purchasing it; A having purchased it, relying upon this statement of B, it was held that the latter was estopped to deny that the line thus pointed out by him was the true one.[3] So if a grantor point out to his grantee a wrong line, and he, not knowing the contrary, and confiding in that statement, goes on and incurs expenses in building a house within the line thus pointed out to him, the grantor would be estopped to deny that the line thus pointed out was the true one, so as to affect a title to the land on which the house had been erected.[4]

§ 1896. **Illustration — Void Deed made good.** — So where one executed a deed on Sunday, dating it upon another day, and his grantee conveyed to a stranger who was ignorant of this

[1] Welland Canal Co. *v.* Hathaway, 8 Wend. 483. See also Corning *v.* Gould, 16 Wend. 531; Titus *v.* Morse, 40 Me. 348.

[2] Brown *v.* Bowen, 30 N. Y. 541; Hanrahan *v.* O'Reilly, 102 Mass. 201; Anderson *v.* Coburn, 27 Wis. 566; Malloney *v.* Horan, 49 N. Y. 111, 115, 117.

[3] Spiller *v.* Scribner, 36 Vt. 247; Halloran *v.* Whitcomb, 43 Vt. 312.

[4] Rutherford *v.* Tracy, 48 Mo. 325; Adams *v.* Rockwell, 16 Wend. 285; Laverty *v.* Moore, 32 Barb. 351.

fact, the grantor was estopped to set up that the original deed was made on Sunday.[1]

§ 1897. **Where both Parties have Equal Means of Knowledge.** — But the doctrine of estoppel does not apply where everything is equally well known to both parties, or where the party sought to be estopped was ignorant of the facts out of which his rights arose, or where the party seeking to conclude him was not influenced by the acts or admissions which are set up as the grounds of estoppel.[2] And to enable a man to set up a title by estoppel, he must have been ignorant of the true state of the title at the time he took it, or been without means of ascertaining it by a reference to records.[3] In Pennsylvania it has been held, that when a man has encouraged another to settle upon and improve land, and expend his money upon it, he will not be permitted afterwards to take it from him, although he has an older and better title, and acted himself in ignorance of his own right.[4] But this doctrine applies only to a *bona fide* improver, who is led into a mistaken expenditure by the acts or connivance of another, supposing the property to be his own, and not where he knew the land to be in dispute between two parties, and volunteered to originate a new claim.[5]

§ 1898. **When Silence works an Estoppel.** — [If one, aware of his own rights, knowingly, though passively, or by looking on, suffer another to purchase and expend money on land under an erroneous opinion of title without making known his own claim, he will be estopped to set up his own title against the purchaser.[6] But this rule has no application unless there is an obligation to speak on the part of the true owner; which is

[1] Love *v.* Wells, 25 Ind. 503.

[2] Fletcher *v.* Holmes, 25 Ind. 469; Hill *v.* Epley, 31 Penn. St. 334.

[3] Wood *v.* Griffin, 46 N. H. 237; Drew *v.* Kimball, 43 N. H. 282; Gove *v.* White, 20 Wis. 430; Hill *v.* Epley, *supra;* Neal *v.* Gregory, 19 Fla. 356; Jameson *v.* Rixey, 94 Va. 342; s. c. 26 S. E. Rep. 861.

[4] M'Kelvey *v.* Truby, 4 Watts & S. 323.

[5] M'Cormick *v.* M'Murtrie, 4 Watts, 195.

[6] See 2 Smith, Lead. Cas. (5th Am. ed.) 652; Rangeley *v.* Spring, 21 Me. 130; s. c. 28 Me. 127; Crest *v.* Jack, 3 Watts, 239; Aldrich *v.* Billings, 14 R. I. 233; Hatch *v.* Kimball, 16 Me. 146; Titus *v.* Morse, 40 Me. 348; Morrison *v.* Morrison, 2 Dana, 13; Pickard *v.* Sears, 6 A. & E. 469; Snodgrass *v.* Rickets, 13 Cal. 359; Waters' App., 35 Penn. St. 526; Junction R. R. Co. *v.* Harpold, 19 Ind. 350; Hagan *v.* Ellis, 39 Fla. 463; s. c. 22 So. Rep. 727; s. c. 63 Am. St. Rep. 167.

not the case where the purchaser, by the exercise of reasonable diligence, had the means of knowing the true state of the title,[1] as where it is matter of record. But in order that silence in such case may work an estoppel, it must amount to *concealment* of a fact which the purchaser had no reasonable means of knowing.[2] Thus, if a man see another buying land upon which the former has some unrecorded lien or charge, or in which he has an equitable title which has not been recorded and of which the purchaser is ignorant, he would be bound to speak, under penalty of being estopped.[3] But if a man's claim appears duly of record, this is all the notice he is bound to give, so long as he merely remains passive.[4] "It is only when silence becomes a fraud that it postpones."[5] Nor will the true owner be estopped by silence if he is ignorant of his own rights.[6]]

§ 1899. **Misrepresentation must have misled.** — No man can set up another's act or declaration as the ground for an estoppel unless he has himself been misled or deceived thereby; nor can he set it up where he knew or had the same means of knowledge, as to the truth of the statement, as the other party.[7] Thus where one, having an estate over which A had a

[1] Hill *v.* Epley, 31 Penn. St. 331; Shapley *v.* Rangeley, 1 Woodb. & M. 217; Hill *v.* Meyers, 43 Penn. St. 175; Neal *v.* Gregory, 19 Fla. 356; Simpson *v.* Biffle, 63 Ark. 289; s. c. 38 S. W. Rep. 345. Where a husband conveyed his land by his sole deed, his wife was under no obligation to give notice of her inchoate right of dower. Madson *v.* Madson, 69 Minn. 37; s. c. 71 N. W. Rep. 824.

[2] Parker *v.* Barker, 2 Met. 423; Copeland *v.* Copeland, 28 Me. 525; Stevens *v.* McNamara, 36 Me. 178; 2 Smith, Lead. Cas. (5th Am. ed.) 650.

[3] Gray *v.* Bartlett, 20 Pick. 193; Rice *v.* Bunce, 49 Mo. 231.

[4] Goundie *v.* Northampton Water Co., 7 Penn. St. 233; Knouff *v.* Thompson, 16 Penn. St. 364; Patterson *v.* Esterling, 27 Ga. 207; Fisher *v.* Mossman, 11 Ohio St. 42, 47; Tongue *v.* Nutwell, 17 Md. 212, 230; Hill *v.* Epley, 31 Penn. St. 331; Odlin *v.* Gove, 41 N. H. 477; Brinckerhoff *v.* Lansing, 4 Johns. Ch. 70; Bigelow *v.* Topliff, 25 Vt. 287; Carter *v.* Champion, 8 Conn. 554.

[5] Hill *v.* Epley, 31 Penn. St. 331. See also Pickard *v.* Sears, 6 Ad. & E. 469; Wells *v.* Pierce, 27 N. H. 511; Drew *v.* Rust, 36 N. H. 342; Gregg *v.* Wells, 10 Ad. & E. 90; Blackwood *v.* Jones, 4 Jones (N. C.), Eq. 56; Cochran *v.* Harrow, 22 Ill. 345; Watkins *v.* Peck, 13 N. H. 373; Brinckerhoff *v.* Lansing, 4 Johns. Ch. 70; Davis *v.* Davis, 26 Cal. 42; *post*, § 1901.

[6] Williams *v.* Champion, 39 N. J. Eq. 350; Hays *v.* Hays, 179 Penn. St. 277; s. c. 36 Atl. Rep. 311; Collins *v.* Williams, 98 Tenn. 525; s. c. 41 S. W. Rep. 1056.

[7] Ormsby *v.* Ihmsen, 34 Penn. St. 472; Gray *v.* Bartlett, 20 Pick. 193; McCune *v.* McMichael, 29 Ga. 312; Jewett *v.* Miller, 10 N. Y. 406; Hill *v.* Epley, 31 Penn. St. 331; Ferris *v.* Coover, 10 Cal. 589.

right of way, made a will, and appointed A his executor, with a power to sell the testator's lands. A did so, and B bid off the parcels over which A had the right of way. B afterwards refused to accept a deed unless A would give up his right of way across the premises; which he agreed orally to do, and B took the deed. It was held, that as A received no consideration for the promise, and as B was bound to accept the deed by virtue of his bid, the giving up the easement was not the inducement to do anything which he was not already bound to do, and therefore A was not estopped to claim the easement.[1] But where A sold land to B by parol, without giving any deed, and represented to C that he had conveyed it to B, and thereupon C purchased the estate of B, and made improvements upon it, it was held that A was estopped to set up a title against C, on the ground that he had not made a deed to B.[2] So where the heirs of A, under a mistaken supposition that his executor or one of the heirs was authorized to sell his lands, informed one who wished to purchase these that the executor or heir named was authorized to convey them, and he took a deed from the executor and heir, they were estopped to claim the land, whether these representations were made fraudulently or under a mistake, inasmuch as the purchaser had acted on the faith of their being true.[3]

§ 1900. **Misrepresentation must have induced the other to act to his Injury.** — A party who insists upon the act of another as working an estoppel must show that he acted upon the same, and that it formed the inducement which led him at the time to do what he did. Thus, where an infant, whose land had been irregularly sold during his minority, made declarations after he came of age, expressing his satisfaction with the sale, it was held not to be an estoppel to his claim to the estate, because, being made long after the sale, it could have formed no inducement to the party to make the purchase.[4] So a disclaimer of title made to one who was not thereby influenced to rely upon it, and did not actually rely upon it in his acts,

[1] Erb *v.* Brown, 69 Penn. St. 216.
[2] Keys *v.* Test, 33 Ill. 316.
[3] Favill *v.* Roberts, 50 N. Y. 222.
[4] Ackley *v.* Dygert, 33 Barb. 176; Allen *v.* Allen, 45 Penn. St. 473.

in such a manner that it would work a fraud upon him to have it denied or retracted, would not work an estoppel.[1] Nor would failure to disclose a title, on the part of one who has a lien on the land, if he first hears of the bargain after the sale is consummated, e. g. where the purchase-money for land was counted over, for the sake of accuracy, by a county court clerk, and the deed acknowledged before him, he having at the time a judgment lien on the land, it was held that he was not estopped from afterwards asserting this title, although he had, at the time of the acknowledgment, said nothing about it.[2] But where one, about to purchase a parcel of land, inquired of B if he had any claim upon it, and he, by forgetfulness and honest mistake, informed the inquirer that he had not, when in fact he had, he was estopped to set it up against this purchaser who had acted upon the faith of his representation.[3] So if one holding a mortgage upon land actively induce a person to purchase it of the mortgagor, without disclosing his mortgage, he would be estopped to claim under it.[4] So if one holding a second mortgage induces another to buy the mortgage by representing that it is a first lien on the land, he cannot afterwards assert a prior mortgage, to the injury of the other.[5] And the one claiming the estoppel must show that injury would result to him but for the estoppel.[6]

§ 1901. **Of the Intention to deceive.** — [Upon the question whether or not the party who makes the misleading statements must be aware of the untruth of his statements in order to be estopped the authorities are not harmonious. Some courts have adopted the rule that "the doctrine of estoppel *in pais*, or equitable estoppel, is based upon a fraudulent purpose and

[1] Mahoney *v.* Van Winkle, 21 Cal. 580 ; Carpentier *v.* Thirston, 24 Cal. 283. See also Davis *v.* Davis, 26 Cal. 38–44.

[2] Askins *v.* Coe, 12 Lea, 672.

[3] Beardsley *v.* Foot, 14 Ohio St. 416, and cases cited on p. 417 ; Robey *v.* Williams, 73 Mo. 210 ; Spencer *v.* Carr, 45 N. Y. 406 ; Slim *v.* Croucher, 1 De Gex, F. & J. 518 ; Bullis *v.* Noble, 36 Iowa, 618.

[4] Bigelow *v.* Foss, 59 Me. 162.

[5] Dodge *v.* Pope, 93 Ind. 480. And see Mott *v.* German Hosp., 55 N. J. Eq. 722; s. c. 37 Atl. Rep. 757 ; Rainey *v.* Hines, 120 N. C. 376 ; s. c. 27 S. E. Rep. 92 ; Bettman *v.* Harness, 42 W. Va. 433 ; s. c. 26 S. E. Rep. 271.

[6] See cases *supra*.

a fraudulent intent. If, therefore, the element of fraud be wanting, there is no estoppel."[1] But the fraud must consist of some intended deception in the conduct or declarations of the party to be estopped, or such gross carelessness on his part as amounts to constructive fraud.[2] But the cases are not few that hold that "where one advises and encourages another to enter upon, and invest his money in, or expend his labor on, land with the assurance that he will thereby acquire a title to it, such a one will not be permitted afterwards to call in question such title, although he acted in ignorance of his own right. It is enough that the one was misled by the acts or declarations of the other, if the same were intended to influence, and did influence his conduct, although no fraud was designed;"[3] and this, on the familiar principle, that if one of two innocent parties must suffer, he through whose agency the loss occurred should sustain it. And while mere silence by one who is ignorant of his rights will not work an estoppel, it is otherwise in the case of actual misrepresentation; as where husband and wife were tenants by the entirety, and, after the husband's death, the estate was sold, and the widow, ignorant of her rights as survivor, and in good faith, encouraged a purchaser to buy, she and her heirs were estopped to set up a claim to the estate.[4]]

[1] Davidson *v.* Young, 38 Ill. 152; Story, Eq., Redfield's ed. § 1543.

[2] Henshaw *v.* Bissell, 18 Wall. 271; Steel *v.* Smelting Co., 106 U. S. 447; Stevens *v.* Dennett, 51 N. H. 324; Greene *v.* Smith, 57 Vt. 268; Boggs *v.* Merced Mining Co., 14 Cal. 367; McCracken *v.* San Francisco, 16 Cal. 626; Glidden *v.* Struppler, 52 Penn. St. 405; Copeland *v.* Copeland, 28 Me. 539; Whitaker *v.* Williams, 20 Conn. 104; Delaplaine *v.* Hitchcock, 6 Hill, 17; Tolman *v.* Sparhawk, 5 Met. 475; Brewer *v.* Boston & W. R. R. Corp., id. 478.

[3] Woodward *v.* Tudor, 81 Penn. St. 394; Miller's Appeal, 84 Penn. St. 391; Beaupland *v.* McKeen, 28 Penn. St. 124; Robinson *v.* Justice, 2 Penn. 22; Morris Canal, etc. Co. *v.* Lewis, 12 N. J. Eq. 332; Knouff *v.* Thompson, 16 Penn. St. 361; Waters' App., 35 Penn. St. 526; Freeman *v.* Cooke, 2 Exch. 663; Cornish *v.* Abington, 4 Hurlst. & N. 549; Jewett *v.* Miller, 10 N. Y. 406; McCune *v.* McMichael, 29 Ga. 312; Tilton *v.* Nelson, 27 Barb. 595; Blackwood *v.* Jones, 4 Jones, Eq. 56; Newman *v.* Edwards, 34 Penn. St. 34; Snodgrass *v.* Ricketts, 13 Cal. 362; Barnes *v.* McKay, 7 Ind. 301; Howard *v.* Hudson, 2 El. & Bl. 10; Andrews *v.* Lyon, 11 Allen, 349; Cont. Nat. Bk. *v.* Nat. Bk., 50 N. Y. 575; Blair *v.* Wait, 69 N. Y. 113; Anderson *v.* Hubble, 93 Ind. 570.

[4] Maple *v.* Kussart, 53 Penn. St. 352. And see Tilton *v.* Nelson, 27 Barb. 595; Storrs *v.* Barker, 6 Johns. Ch. 166; Bigelow *v.* Foss, 59 Me. 162; Hunsden *v.* Cheyney, 2 Vern. 150.

§ 1902. **There must be Intent to influence Action.** — In order, however, to work an estoppel *in pais*, the acts and declarations relied on must have been accompanied with an intention and design that they should be acted upon by the party who sets up the estoppel, and he must have acted upon them accordingly.[1] Silence alone would not have that effect, unless it were in itself fraudulent,[2] or, as it is sometimes termed, culpable.[3]

§ 1903. **Fixing Boundary-lines by Estoppel.** — Numerous questions have arisen between parties owning adjoining lands from fixing the dividing-lines between them, or constructing division-fences separating them, wherein it has been attempted to apply the doctrine of estoppel, excluding the right to change these, if afterwards found not to conform to the true division-lines. Many of these cases will be found collected in 2 Smith's Leading Cases (5th Am. edition, p. 649). But the decisions have been so variant, that a few of them ought properly to be mentioned before attempting to deduce any rule applicable to such cases. In Commonwealth *v.* Pejepscut Proprietors,[4] a resolve of the legislature, establishing the bounds of the lands of the State, estopped the latter from denying they were the true bounds. In Laverty *v.* Moore,[5] two adjoining owners of land covered with water, which they were about to fill, agreed upon a line between them, and one of them went on and filled his part up to the line agreed upon. The other having claimed beyond this line, the court held he was estopped to deny that the line agreed upon was the true one, it having been settled by the acts and acquiescence of the respective owners on each side. It will be remarked, that the act of filling, in this case, had greatly enhanced the original value of the land at the expense of him who made it. On the other hand, there is a class of cases, where, as in Tolman *v.* Sparhawk, above cited,

[1] Turner *v.* Coffin, 12 Allen, 401; Andrews *v.* Lyons, 11 Allen, 350; Plumer *v.* Lord, 9 Allen, 457, 458; Brown *v.* Bowen, 30 N. Y. 541; Plumb *v.* Cattaraugus Co. M. Ins. Co., 18 N. Y. 392; Russell *v.* Maloney, 39 Vt. 584.

[2] Maple *v.* Kussart, 53 Penn. St. 352; Allen *v.* Kellam, 69 Ala. 442; Acton *v.* Dooley, 6 Mo. App. 323.

[3] Morgan *v.* Railroad Co., 96 U. S. 720.

[4] 10 Mass. 155.

[5] 32 Barb. 347, 351.

it has been held that a line agreed upon, or a division-fence constructed by parties, if the same were done under a mistake, and the true line were afterwards to be ascertained, might be corrected.[1] But a different doctrine was held in Iowa, where the parties had, by mistake, occupied up to a dividing-fence, on each side, for the period of limitation. The mutual mistake would not affect the rights of the parties arising from adverse possession.[2] So, in Brewer *v.* Boston and Worcester Railroad,[3] the parties, intending to establish the true division-line between them, fixed the bounds indicating this line, and occupied their lands accordingly for more than twenty years. When the tenant, who had purchased of the original owner upon one side of the line, was about to make the purchase, he inquired of the other owner as to the land, and was told by the latter that he did not own beyond the line above mentioned. The tenant thereupon purchased and entered upon the land, filled it up, erected fences and buildings upon it, in the presence of the other owner, who frequently pointed out the line, and never objected to the acts of the tenant, nor gave him any notice that he claimed the land. It was afterwards, by the decision of another case, ascertained that the line agreed upon and occupied was not the true line; and the party who had agreed to it brought an action against the tenant to recover the strip of land between the true and agreed lines. And the court held that he was not estopped by these several transactions, because the line was agreed upon in good faith, under a mistake of facts, and it was now ascertained where the true line was. The party made no declaration contrary to his honest belief at the time, or with any intention to deceive the tenant. The court, moreover, state this broad proposition, which certainly is apparently at variance with more than one of the propositions contained in what has already been said: "A party is not to be estopped to prove a legal title to his estate by any misrepresentation

[1] Liverpool Whf. *v.* Prescott, 7 Allen, 494; Thayer *v.* Bacon, 3 Allen, 163; Coon *v.* Smith, 29 N. Y. 392; Baldwin *v.* Brown, 16 N. Y. 359; Russell *v.* Maloney, 39 Vt. 580; Hass *v.* Plautz, 56 Wis. 105; Trussel *v.* Lewis, 13 N. B. 415.

[2] Burdick *v.* Heivly, 23 Iowa, 515.

[3] 5 Met. 478. See also Cook *v.* Babcock, 11 Cush. 210. But see Blair *v.* Smith, 16 Mo. 281.

of its locality, made by mistake, without fraud or intentional deception, although another party may be induced thereby to purchase an adjoining lot, the title to which may prove defective." Whether the doctrine above stated can be reconciled to rules and dicta which are found in the cases before cited, or some of those hereafter mentioned, it is well to discriminate between cases like that of Brewer *v.* Boston and Worcester Railroad, and another class which have arisen in the same court, and might, at first thought, mislead the inquirer. If, for instance, the line between two adjacent owners be in dispute, and the parties refer to arbitrators to determine the same, who hear and award upon the subject, the several owners will be bound to conform to such award.[1] But while the award of arbitrators as to such line would be binding upon the parties to it, no award as to the *title* to any part of such lands would be binding.[2] A mere agreement, though a mutual one, to employ a common agent to run a line and set up the bounds between two proprietors, would not estop either party from showing an error or mistake in this line.[3] So where the deeds of the parties called for certain monuments not then in existence, or a certain line which had not been run out on the surface of the earth, and the parties came together and fixed the monuments, or agreed upon where the line should run, they would, if it was followed by occupation, be bound by their agreement, and estopped from claiming another.[4] The distinction between these classes of cases is, that, in the one, the parties, by mistake, agree upon a line where their mistake can be corrected, and the true line ascertained; in the other, they simply make that certain which had never before been determined. Thus, in Kellogg *v.* Smith, the deed referred to a certain line not ascertainable by existing bounds or known monuments. The adjoining owners

[1] Goodridge *v.* Dustin, 5 Met. 363. See Whitney *v.* Holmes, 15 Mass. 152; Kellogg *v.* Smith, 7 Cush. 381; Davis *v.* Townsend, 10 Barb. 333; Vosburgh *v.* Teator, 32 N. Y. 561.

[2] Vosburgh *v.* Teator, 32 N. Y. 567; Jackson *v.* Dysling, 2 Cain. R. 198; Robertson *v.* M'Niel, 12 Wend. 578; Terry *v.* Chandler, 16 N. Y. 356.

[3] Thayer *v.* Bacon, 3 Allen, 164; Russell *v.* Maloney, 39 Vt. 580; Doe *v.* McCullough, 1 Kerr (N. B.), 466; Vosburgh *v.* Teator, 32 N. Y. 561.

[4] Turner *v.* Baker, 64 Mo. 218.

agreed that certain existing marks or monuments should indicate where the line was; and, after that, occupied each to that line for a considerable length of time. The court held the parties bound and estopped by this as the true line. Among the cases referred to by the court was a class where the parties, in fixing the *location* of their lands, agreed upon a certain line between them. This, if followed by an occupancy, was held to bind them by such agreement, if the line they had thus fixed had previously been ambiguous and uncertain.[1] Thus, where two purchasers of a lot employed a surveyor to divide it and fix the line between the divisions, and one of them thereupon went on and erected a house, and, in so doing, occupied up to the line thus fixed, and continued to do so for a period less than that of limitation, it was held that the other owner was estopped to object that the line ought to be a few inches from the one run, and thereby to cut off that width from the house.[2] In another, the parties settled a disputed line by agreement, and occupied under it, and it was held to estop them.[3] But this seems to imply that there is no satisfactory mode of determining what the true line is; and if, under such circumstances, the parties agree upon one, and mutually enter upon the occupancy of their lands in conformity to this, they thereby make that the line by which they are mutually to be bound as the true one.[4] In Massachusetts, the

[1] Adams *v.* Rockwell, 16 Wend. 285; s. c. 7 Cow. 761; Jackson d. Goodrich *v.* Ogden, 7 Johns. 238; Dibble *v.* Rogers, 13 Wend. 536; Chew *v.* Morton, 10 Watts, 321; Gray *v.* Berry, 9 N. H. 473; Orr *v.* Hadley, 36 N. H. 575, 578, 579; Lindsay *v.* Springer, 4 Harring. 547; Rockwell *v.* Adams, 6 Wend. 467. See Jackson d. Van Cortlandt *v.* Van Corlaer, 11 Johns. 123; Jackson d. Stoutenburgh *v.* Murray, 7 Johns. 5; Terry *v.* Chandler, 16 N. Y. 355; Doggett *v.* Willey, 6 Fla. 482, 507.

[2] Joyce *v.* Williams, 26 Mich. 332; Smith *v.* Hamilton, 20 Mich. 438. But no estoppel would arise where there is no agreement between the parties, and one, in ignorance of the true line, builds a fence inside his line, even though the other owner is led thereby to make improvements on the strip. Iverson *v.* Swan, 167 Mass. 582; s. c. 48 N. E. Rep. 282; Beecher *v.* Ferris, 112 Mich. 584; s. c. 90 N. W. Rep. 1106.

[3] Kip *v.* Norton, 12 Wend. 127; Houston *v.* Sneed, 15 Tex. 307; Davis *v.* Townsend, 10 Barb. 333; Knowles *v.* Toothaker, 58 Me. 174; Ernsting *v.* Gleason, 137 Mo. 594; s. c. 39 S. W. Rep. 70; Gayheart *v.* Cornett, Ky. ; s. c. 42 S. W. Rep. 730; Elmore *v.* Davis, 48 S. C. 388; s. c. 26 S. E. Rep. 680.

[4] Sneed *v.* Osborn, 25 Cal. 624, 630; Blair *v.* Smith, 16 Mo. 279; Russell *v.* Maloney, 39 Vt. 580.

court have held that a party who should agree upon a line by mistake would not be estopped to claim up to the true line, although the other party may, in the mean time, have erected buildings or incurred other expense upon the land which he claims;[1] while in New York, under like circumstances, it was held that it would work an estoppel, if the party making the improvements would otherwise lose the benefit of the same.[2] In another, such an agreement was held to be only *prima facie* evidence of what was the true line, but not conclusive.[3] The law, as stated in a later case in New York on this subject, is, if adjacent proprietors fix a boundary-line between them, in which they both acquiesce, and to which they occupy for a long period, "rarely less than twenty years," it is held to be of such a conclusive nature, that either party is precluded from offering any evidence to the contrary. "Unless their acquiescence has continued for a sufficient length of time to become thus conclusive, it is of no importance."[4] And in another it was held, that if, after such agreement, one of the parties were to see a third party take a conveyance of the adjacent land for a valuable consideration according to the monuments agreed upon, he would be estopped to claim adversely to such monument.[5] While, in another case, the court laid down the doctrine broadly, that "an admission by a party of a mistaken line for the true one has no legal effect upon his title."[6] In the case of Adams *v.* Rockwell, cited in note 1 on the preceding page, an element of estoppel was recognized as applicable to cases where the line had been agreed upon by mistake, and could be ascertained, and that was in the words of the head-note: "If, during such acquiescence, expensive improvements,

[1] Liverpool Whf. Co. *v.* Prescott, 7 Allen, 496; Proctor *v.* Putnam Mach. Co., 137 Mass. 159. See Knowlton *v.* Smith, 36 Mo. 507; Kincaid *v.* Dormey, 51 Mo. 552; Terry *v.* Chandler, 16 N. Y. 354; Vosburgh *v.* Teator, 32 N. Y. 561.

[2] Corkhill *v.* Landers, 44 Barb. 228.

[3] Gove *v.* Richardson, 4 Me. 327.

[4] Reed *v.* Farr, 35 N. Y. 117, affirming Baldwin *v.* Brown, 16 N. Y. 359. See Doe *v.* McCullough, 1 Kerr (N. B.), 460; Sneed *v.* Osborn, 25 Cal. 626; Boyd *v.* Graves, 4 Wheat. 517; Liverpool Whf. Co. *v.* Prescott, 7 Allen, 496; Reed *v.* McCourt, 41 N. Y. 441; Welton *v.* Poynter, 96 Wis. 346; s. c. 71 N. W. Rep. 597.

[5] Colby *v.* Norton, 19 Me. 412.

[6] Crowell *v.* Bebee, 10 Vt. 33.

by the erection of buildings or otherwise, had been made by the occupant of the premises in dispute, the owner would have been estopped from setting up the true line."

§ 1904. **Distinction between Estoppel and Limitation.** — [A careful distinction must be made between those cases where the mistaken location of a boundary-line or fence gives rise to an estoppel, and those cases where the parties have by mistake agreed upon the boundary-line and one of them, by actual occupation up to this line, has acquired title by possession to a strip which originally belonged to his neighbor.[1]]

§ 1905. **Dedications to Public and Charitable Uses.** — The doctrine of estoppel is applied to the case of a dedication of the use of one's land to the public as a public common, landing-place, or highway, where private and individual rights have been acquired in reference to it.[2] A dedication to pious and charitable uses may be effectual, though not distinctively a public one; and, if so made that the holder of the estate becomes a trustee for the purposes of a charity, no subsequent conveyance to one having notice could change the use. The grantee would himself become the trustee. But the mere erecting of a church for a religious society does not dedicate it. The owner may sell it if he pleases. To effect such a dedication, there must be a donation by the owner, or some unequivocal act united with an intent to divest himself, to some extent, of the ownership or power of control over the property, and to vest an independent and irrevocable interest in some other person or body.[3] No one but the owner of land in fee can dedicate it, or the use of it, to the public. And it is, moreover, essential to a dedication that the owner should intend what he does as a dedication, and this must be found affirmatively by the jury to constitute it such.[4] The law considers such a state of things

[1] Reiter *v.* McJunkin, 173 Penn. St. 82; s. c. 33 Atl. Rep. 1012; Ward *v.* Ihler, 132 Mo. 375; s. c. 34 S. W. Rep. 251; Cox *v.* Daugherty, 62 Ark. 629; s. c. 36 S. W. Rep. 184; Boyd *v.* Graves, 4 Wheat. 513; Alexander *v.* Wheeler, 69 Ala. 332; Walker *v.* Simpson, 80 Me. 143; s. c. 13 Atl. Rep. 580; Halloran *v.* Halloran, 149 Mass. 298; s. c. 21 N. E. Rep. 374.

[2] Washb. Ease. (3d ed.) 185; Boyce *v.* Kalbaugh, 47 Md. 334.

[3] Atty.-Gen. *v.* Merrimack Mg. Co., 14 Gray, 586, 604.

[4] Baugan *v.* Mann, 59 Ill. 492; Harding *v.* Hale, 61 Ill. 192; McWilliams *v.* Morgan, 61 Ill. 89.

in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication; for this would be a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted. But, in accepting the dedication of a way, the public take it as it is; and if defective or dangerous, the public will be responsible.[1] If land has been dedicated and accepted as a public square, for instance, and individuals, upon the faith thereof, have built their houses in reference to it as such, the dedication cannot afterwards be rescinded and revoked.[2] And this applies as well to a dedication by a public body as to one by a private individual. Thus, where the commissioners of a county laid out a town for a county seat by a plot, on which certain squares were indicated as "public lots," and individuals built around one of these, it was held that they might enjoin the erection of buildings upon the land thus set apart.[3] Nor does the estoppel depend on the length of time for which this use shall have been enjoyed.[4]

§ 1906. **Arbitrament and Award.** — There is another act of parties which may operate in the nature of an estoppel, not in conveying a title to lands from one to another, but in quieting titles so as to estop any adverse claim; and that is by arbitrament and award, where the parties have submitted to arbitrators the question of property in lands, and an award upon the point has been made and published. Such award is conclusive as to their respective rights of property, even though the submission and award were by parol.[5] This is especially true in establishing lines between two contending parties.[6] But to have

[1] Robbins *v.* Jones, 15 Com. B. N. S. 221; Mercer *v.* Woodgate, L. R. 5 Q. B. 26; Gould *v.* Boston, 120 Mass. 300.

[2] Livermore *v.* Maquoketa, 35 Iowa, 360.

[3] Rutherford *v.* Taylor, 38 Mo. 315; Abbott *v.* Mills, 3 Vt. 521; Washb. Ease. (3d ed.) 217.

[4] Cincinnati *v.* White, 6 Pet. 438; Hobbs *v.* Lowell, 19 Pick. 405; Hunter *v.* Sandy Hill Trs., 6 Hill, 407; State *v.* Trask, 6 Vt. 355.

[5] Doe d. Morris *v.* Prosser, 3 East, 15; Goodridge *v.* Dustin, 5 Met. 363, 367; Trustoe *v.* Yewre, Cro. Eliz. 223; Baker *v.* Townsend, 7 Taunt. 422; Shelton *v.* Alcox, 11 Conn. 240; Bowen *v.* Cooper, 7 Watts, 311; Shepard *v.* Ryers, 15 Johns. 497; Carey *v.* Wilcox, 6 N. H. 177; Watson, Arb. 38, 39; 2 Smith, Lead. Cas. (5th Am. ed.) 650.

[6] Sellick *v.* Adams, 15 Johns. 197; Robertson *v.* M'Niel, 12 Wend. 578.

that effect, such parol award must relate to something which was uncertain and in dispute.[1]

§ 1907. **Destruction and Re-delivery of Deeds.** — [It sometimes happens that parties to an executed conveyance wish to place themselves *in statu quo ;* and to effect this, the deed is returned to the grantor and destroyed. Although the re-delivery of the deed was ineffectual to pass the title back, the transaction contains all the elements of an estoppel, and the grantee will not be allowed to claim under the deed which was destroyed with his consent with the intent to deprive him of his estate. This application of the doctrine of estoppel *in pais* is discussed at length, *post*, § 2182.]

§ 1908. **Purchaser under Executory Contract.**— If one enters upon land under an executory contract with another, he will be estopped to deny the title of the latter, as it would be a violation of good faith to obtain possession under such an agreement, and then to deny the right of the other party to reclaim the possession, or the fruits of the contract.[2]

§ 1909. **Landlord and Tenant — Mortgagor and Mortgagee.** — Another class of estoppel is that which arises from the possession of land by one, under an obligation to give up the possession to another, from whom he had it. The most familiar instance of this class is the rule that a lessee entering into possession under a lease is estopped to deny his landlord's title.[3] This class was originally considered to be a species of estoppel by deed, but the better writers and judges now rank it among estoppels *in pais*.[4] The estoppel exists wherever the obligation to return the possession exists; for instance, as between landlord and tenant, or mortgagor and mortgagee.[5] In such cases, the occupant is considered to have pledged his faith to return the possession of the land which he occupies, and will not be permitted to do anything to impair the title of him

[1] Davis *v.* Townsend, 10 Barb. 333; Vosburgh *v.* Teator, 32 N. Y. 561 ; Terry *v.* Chandler, 16 N. Y. 354.

[2] Million *v.* Riley, 1 Dana, 359 ; Harle *v.* McCoy, 7 J. J. Marsh. 318 ; Winlock *v.* Hardy, 4 Lit. 272 ; Moore *v.* Farrow, 3 A. K. Marsh. 41.

[3] Granger *v.* Parker, 137 Mass. 228 ; Weaver *v.* Craighead, 104 Penn. St. 288.

[4] Bigelow, Estoppel, 390 ; Robertson *v.* Pickrell, 109 U. S. 614.

[5] Robertson *v.* Pickrell, *supra;* Miller *v.* Shackleford, 4 Dana, 286 ; Bac. Abr. Leases, O. ; Great Falls Co. *v.* Worster, 15 N. H. 412, 450.

from whom he has received it.[1] As this estoppel rests upon possession, the better opinion is that it lasts as long as the possession continues,[2] although the tenant continues to hold possession after the term has expired,[3] and binds the grantees of the lessee.[4] And it was said in a case decided by the New York Court of Appeals, that the estoppel will continue for twenty years after the end of the term, unless the tenant, by some overt act, yields the possession to the landlord; and not till such act can the holding of the tenant be considered adverse to the possession of the landlord.[5] The earlier cases, however, considered the estoppel to rest wholly upon the lease, and consequently held, that, after the expiration of the term, the tenant might dispute the title of the landlord, although he still held the possession delivered to him by the landlord.[6] As a consequence of holding that the estoppel rests upon the possession, it has been held, that, if the tenant has never taken possession, the estoppel does not arise.[7]

§ 1910. **As between Grantor and Grantee** it seems to be well settled that the delivering of possession under a deed of the fee does not, in the absence of any recitals, raise an estoppel, since the possession then becomes wholly the possession of the grantee, and there is no obligation on his part to return it to the grantor. He may therefore dispute his title.[8] If, however, both parties claim from the same predecessor in title,

[1] Blight *v.* Rochester, 7 Wheat. 535; Granger *v.* Parker, *supra.*

[2] Bailey *v.* Kilburn, 10 Met. 176; Miller *v.* Lang, 99 Mass. 13; Morrison *v.* Bassett, 26 Minn. 235; Love *v.* Law, 57 Miss. 596; Nims *v.* Sherman, 43 Mich. 45.

[3] Tyler *v.* Davis, 61 Tex. 674.

[4] Whiting *v.* Edmunds, 94 N. Y. 309.

[5] Ibid.

[6] Rawlyns' case, Coke, 4 Rep. 54; Taylor, L. & Ten. §§ 88, 89 (3d ed.); Doe d. Strode *v.* Seaton, 2 Cromp., M. & R. 730; Doe d. Brown *v.* Barton, 11 Ad. & E. 307; *ante*, ch. xxvi.

[7] Dist. of Col. *v.* Johnson, 1 Mack. (D. C.) 51.

[8] Osterhout *v.* Shoemaker, 3 Hill (N. Y.), 513; Rawle, Cov. (3d ed.) 403, note; Ham *v.* Ham, 14 Me. 351; Watkins *v.* Holman, 16 Pet. 25, 53; Small *v.* Proctor, 15 Mass. 495; Blight *v.* Rochester, 7 Wheat. 548; Clee *v.* Seaman, 21 Mich. 287; 2 Smith, L. Cas. (5th Am. ed.) 654; Sparrow *v.* Kingman, 1 N. Y. 242; Averill *v.* Wilson, 4 Barb. 180. But see Woolfolk *v.* Ashby, 2 Met. (Ky.) 288, and *post*, § 1934. That it is not an estoppel, see Blair *v.* Smith, 16 Mo. 275, 279; Croxall *v.* Shererd, 5 Wall. 287; Blight *v.* Rochester, 7 Wheat. 548. See Clee *v.* Seaman, *supra.*

neither can deny the title of that predecessor.[1] In regard to the grantee of a life-estate, it has been held that there is no estoppel, at least when the conveyance is by deed-poll, and without covenants.[2]

§ 1911. **Married Women and Infants.** — Whether or not equitable estoppels, or estoppels *in pais*, apply at common law to married women and infants, is differently decided in different States. The better opinion seems to be that any alleged estoppel which rests upon a supposed contract with the infant or married woman, is bad, since the infant or married woman cannot make a binding contract;[3] but where the estoppel is asserted to arise out of the fraudulent conduct of the infant or married woman, and no contract, either express or implied, is involved in the case, the estoppel is good.[4] There are, however, authorities for the statement that estoppel *in pais* has no application to a married woman at common law.[5] And the ground upon which this line of decisions is based is that no one can be divested by estoppel of an estate as to which the party to be estopped was without power to convey by sole deed. If a married woman can estop herself by acts *in pais*, she can accomplish indirectly what the law forbids her to do directly.[6] As the exemption from estoppel is based upon an inability to contract, probably the exemption ceases in those States where married women can contract as if sole; but if there are statutory limitations upon her power to contract,

[1] Wilcoxon *v.* Osborn, 77 Mo. 621.

[2] Robertson *v.* Pickrell, 109 U. S. 608.

[3] Innis *v.* Templeton, 95 Penn. St. 262; Morrison *v.* Wilson, 13 Cal. 494; Lowell *v.* Daniels, 2 Gray, 161; Concord Bank *v.* Bellis, 10 Cush. 276, 278; Glidden *v.* Strupler, 52 Penn. St. 400, 406. But a married woman may estop herself *in pais* as to her claim of homestead in Illinois. Brown *v.* Coon, 36 Ill. 249; Wales *v.* Coffin, 13 Allen, 216. And by statute in Indiana she may estop herself *in pais* as if sole. Wilhite *v.* Hamrick, 92 Ind. 594. As to infants, Lackman *v.* Wood, 25 Cal. 153; Brown *v.* McCune, 5 Sandf. 224; Todd *v.* Kerr, 42 Barb. 317; Williams *v.* Baker, 71 Penn. St. 482.

[4] Carpenter *v.* Carpenter, 25 N. J. Eq. 194; Patterson *v.* Lawrence, 90 Ill. 174; Read *v.* Hall, 57 N. H. 482; Meily *v.* Butler, 26 Ohio St. 535; Bigelow, Estoppel, 513.

[5] Lowell *v.* Daniels, 2 Gray, 161, 168; Merriam *v.* Bost., Cl. & F. R. R. Co., 117 Mass. 241, 244; Unfried *v.* Heberer, 63 Ind. 67; or to infants, Brown *v.* McCune, 5 Sandf. 224; Lackman *v.* Wood, 25 Cal. 147, 153.

[6] Williamson *v.* Jones, 43 W. Va. 562; s. c. 38 L. R. A. 694; s. c. 27 S. E. Rep. 411; Vansandt *v.* Wier, 109 Ala. 104; s. c. 32 L. R. A. 201; s. c. 19 So. Rep. 424.

and she does not comply with those restrictions, the estoppel does not arise.[1]

§ 1912. **Who bound by Estoppel in pais.** — An estoppel *in pais*, where it applies, is as effectual as a deed, but no more so. So that, if the party doing the act could not have made a deed to the land in question, his act cannot create an estoppel in the same.[2] Estoppels bind, and may be relied upon by, parties and their privies.[3] As to whether a municipal corporation can estop itself by acts *in pais* so as to affect street boundaries, the authorities are in conflict. In California, Louisiana, Mississippi, New Jersey, New York, Pennsylvania, and other States it has been held that it cannot do so; while the converse is maintained in Arkansas, Illinois, Kentucky, Massachusetts, Michigan, Maryland, Missouri, Vermont, and other States.[4]

[1] Innis *v.* Templeton, 95 Penn. St. 262; Scott *v.* Battle, 85 N. C. 184.

[2] Lowell *v.* Daniels, 2 Gray, 169; Beaupland *v.* McKeen, 28 Penn. St. 124. But see next preceding section.

[3] *Post*, § 2023.

[4] City of Joliet *v.* Werner, 166 Ill. 34; s. c. 46 N. E. Rep. 780; Baldwin *v.* Trimble, 85 Md. 396; s. c. 37 Atl. Rep. 176; s. c. 36 L. R. A. 489. In the last case cited the authorities on both sides of this question will be found collated.

CHAPTER XCIII.

TITLE BY ESTOPPEL — ESTOPPEL BY DEED.

§ 1913. Nature of estoppel by deed.
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1916. Effect of release or quitclaim.
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1935. Deed must be fair on its face, and inoperative.
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1937. Extent of estoppels.
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1939. First grantee has benefit of estoppel as against subsequent grantee.
1940. Estoppel of grantor binds grantee.
1941. Married women and infants.
1942. Representative grantors, agents, etc.
1943. The State.

§ 1913. **Nature of Estoppel by Deed.** — [If a grantor, in his deed, make an assertion of title, it is assumed that the grantee took the deed on the faith of such assertion; and, if the grant be upon a valuable consideration, the grantor will be estopped to deny that he had any title at the time of the conveyance. Such estoppel operates to pass to the grantee a title afterwards acquired by the grantor. Such representation of title may be

express, — by covenant or recital, — or it may be implied from the estate which the deed purports to convey.] Thus, if, for a valuable consideration, A makes a deed to B, wherein he assumes to convey a specific parcel of land, he thereby asserts that he is the owner of it, and that a title to the same thereby passes to B. And yet, if he has no title, nothing in fact passes by the deed. But if he shall, soon after this, become the owner of this land, and the purchaser insists upon claiming it, it would not be open to him to deny such claim, after having thus taken the grantee's money, and having solemnly declared that he was and should be the owner of the land.[1] So one is estopped to claim that he owned a less interest than the deed he gives purports to convey.[2] Again: it should be remembered that an estoppel by deed is always applied in some action or proceeding based on the deed, in which the fact in question is recited. In a collateral action there can be no estoppel,[3] nor will estoppels by deed avail in favor of any but the parties and their privies.[4] Deeds poll as well as indentures raise estoppels; but they only extend to the title and the existence of a consideration, and not to the amount of the consideration.[5]

§ 1914. **Grantee also estopped.** — By accepting a deed, the grantee or lessee becomes bound not to deny the effect and provisions of such deed.[6] But where a deed was not delivered in the lifetime of the grantor, but the grantee accepted it after his death, and held the estate it purported to grant, it was held that he was estopped to deny that he held under the deed, or to set up a title by adverse possession against the rights of the remainder-man, granted by the same deed.[7] But a vendee

[1] Clark *v.* Baker, 14 Cal. 629.

[2] Smith *v.* Moodus Water Power Co., 35 Conn. 400.

[3] Carter *v.* Carter, 3 Kay & J. 645.

[4] Carpenter *v.* Buller, 8 Mees. & W. 212; McFarland *v.* Goodman, 6 Biss. C. C. 111; 11 Bankr. Reg. 134; 22 Am. L. Reg. o. s. 703. Nor can a deed create an estoppel unless it had been delivered. Nourse *v.* Nourse, 116 Mass. 104.

[5] Wilkinson *v.* Scott, 17 Mass. 257; Fairley *v.* Fairley, 34 Miss. 18.

[6] Shep. Touch. Prest. ed. 53; Comstock *v.* Smith, 13 Pick. 116, 121. Thus, where one accepts a deed which recites that the conveyance is subject to a mortgage, he is estopped to deny the existence of the mortgage. Johnson *v.* Thompson, 129 Mass. 398.

[7] Ford *v.* Flint, 40 Vt. 382; Clee *v.* Seaman, 21 Mich. 297.

of land would not be estopped to deny any other title or interest of the vendor, except that which he had by the contract professed to claim; and if the vendor's deed be one of quitclaim only, the vendee, in an action of ejectment by the vendor, may deny his title.[1] Thus it is never permitted to a person to accept a deed with covenants of seisin, and then turn around upon his grantor and allege that his covenant is broken, because he, the grantee, was himself seised of the premises at the time of the making of the deed.[2] So where one, who owns land adjacent to that of another, purchases of the latter a parcel bounding by his own, and the line is definitely described in the deed, he and his successors would be estopped to claim that he was, when he took his deed, holding adversely any part of the land beyond the boundary-line thus described.[3] But a grantor may disseise his grantee; and if he does so, he would not be estopped by his deed to claim title against his grantee by adverse possession as such disseisor to the land which he had formerly conveyed.[4] [But the doctrine of estoppel as applied to a grantee is limited to cases where he is under an obligation, express or implied, to surrender possession, or mutual obligations are assumed; but where there are no mutual obligations, the grantee holds under an "executed" title and may deny his grantor's title as he could that of a stranger. Thus, the grantee in fee under a deed poll may deny the grantor's seisin to defeat his widow's claim for dower.[5]]

§ 1915. **Conveyances which raise an Estoppel.** — Some forms of conveyance operate as an estoppel against those who make them, from their very nature, as is the case with a feoffment. Others, as is the case with a simple release, have no effect beyond passing or extinguishing whatever interest the releasor has at the time. Others operate by way of estoppel, by reason

[1] Clee *v.* Seaman, 21 Mich. 287.

[2] Fitch *v.* Baldwin, 17 Johns. 161. See Smith *v.* Strong, 14 Pick. 128.

[3] Hodges *v.* Eddy, 38 Vt. 349; Root *v.* Crock, 7 Penn. St. 378.

[4] Franklin *v.* Dorland, 28 Cal. 180; Hines *v.* Robinson, 57 Me. 331; Traip *v.* Traip, id. 268.

[5] Winlock *v.* Hardy, 4 Lit. 272; Moore *v.* Forrow, 3 A. K. Marsh. 41; Lewis *v.* Baird, 3 McLean, C. C. 79; Small *v.* Proctor, 15 Mass. 499; Sparrow *v.* Kingman, 1 Comst. 242; Crittenden *v.* Woodruff, 11 Ark. 82; 2 Smith, Lead. Cas. (5th Am. ed.) 655; Flagg *v.* Mann, 14 Pick. 482; Gardner *v.* Greene, 5 R. I. 104.

of the covenants as to title they contain : and it may be stated as a general proposition, that a party to a deed is estopped to deny anything stated in the deed which has operated upon the other party as the inducement to accept and act under such deed ; and this extends to facts stated in other deeds referred to directly, or by way of recital. Thus a feoffment by a person who is not the owner of lands, passes, of necessity, a fee by wrong or disseisin. It binds the feoffor for life by estoppel, so that he cannot claim the right, should it descend to him, against his own feoffee. He cannot purchase the fee, since his feoffment is a disseisin. But it is an estoppel only to him personally, and will not bind his heirs. Lord Coke says there is a diversity between a feoffment and a warranty. A feoffment is good against the feoffor, but not against his heirs ; a warranty is good against one and his heirs. As far as the heir claims as heir, he may be barred by force of the warranty as a rebutter, though not bound by the feoffment.[1] Thus, if an heir apparent makes a feoffment, in the life of his ancestor, of land which afterwards descends to him, he will be estopped to set up a title against his feoffee.[2]

§ 1916. **Effect of Release or Quitclaim.** — There are various reasons why a deed of simple release passes only such interest or estate as the releasor has at the time, and never operates by way of estoppel to convey any interest which he may afterwards acquire. In order to prevent maintenance and the multiplying of contentions, as stated by Lord Coke, it was an established maxim of the common law, that no *possibility*, right, title, or any other thing, that was not in possession or *vested in right*, could be granted or assigned to strangers.[3] Thus a simple release by an heir apparent of his chance of succession, though made by deed, will not bar his title when it accrues.[4] But one who has a contingent remain-

[1] 2 Prest. Abst. 212 ; Burt. Real Prop. § 83 ; Co. Lit. 265 *a*. Although the old warranty of the common law never had any existence in the United States, yet the personal covenants of warranty in a deed operate as an estoppel or rebutter to prevent the heir from claiming the estate. Carson *v.* New Bellevue Cemetery Co., 104 Penn. St. 575.

[2] 2 Prest. Abst. 408, 409.

[3] Co. Lit. 265 *a*, note 212.

[4] 1 Prest. Abst. 302 ; 2 Prest. Conv. 268 ; Bryan *v.* Uland, 101 Ind. 477.

der, an interest by way of executory devise, or a possibility like that of an heir apparent, even though he may not at common law make a grant of such an interest by deed so as to pass the same distinctly, may convey the estate out of which his interest is to arise, in such a manner that this will operate as an estoppel, and prevent his claiming such interest when it arises.[1] But in such cases as those supposed above, there must be either a grant or release with a general covenant of warranty, or an express affirmation in the grantor's deed of there being an estate such as he assumes to convey.[2]

§ 1917. **Releases estop as to Existing Titles.** — Though in one sense a deed of acquittance or release may be said to be an estoppel, as it is a valid and final bar to all existing claims, and all the possibilities arising from previous contracts of which it imports a relinquishment, it cannot affect rights of which the foundation is laid afterwards.[3] Thus, where one who was entitled to a contingent remainder conveyed the same, and afterwards the estate became vested, if the conveyance was by a quitclaim, his deed was no bar to his claiming the estate, but if the deed contained covenants of warranty, he was estopped to claim it. The contingency in this case, it may be remarked, consisted in the grantor's taking as the oldest surviving son at the death of his father.[4] A release of disseisee to a disseisor would be an effectual bar of his claim to the estate.[5]

§ 1918. **Effect of Primary Deed without Covenant.** — [Although a deed may contain no express covenants, yet where it is apparent, upon the face of the deed, that the bargain was for the conveyance of an estate of a particular description, the grantor will be estopped to deny that he had title, and an

[1] 2 Prest. Abst. 210; 2 Prest. Conv. 268, 271; Hayne *v.* Maltby, 3 T. R. 438; Weale *v.* Lower, Pollexf. 54; Purefoy *v.* Rogers, 2 Saund. 388 *d*; Fitch *v.* Fitch, 8 Pick. 483; Watk. Conv. 199, Coventry's note; Stover *v.* Eycleshimer, 46 Barb. 84.

[2] White *v.* Patten, 24 Pick. 324–328; Wight *v.* Shaw, 5 Cush. 56, 63.

[3] Burt. Real Prop. § 149; Co. Lit. 265 *a*; Lit. § 446. See 2 Smith, Lead. Cas. (5th Am. ed.) 624; Bruce *v.* Luke, 9 Kan. 201.

[4] Robertson *v.* Wilson, 38 N. H 48.

[5] Perkins, § 86; 2 Prest. Conv. 269.

after-acquired title will enure to the benefit of his grantee.[1] The benefit of the estoppel is most frequently invoked in the cases of deeds containing express admissions and recitals.] The general doctrine as to the effect of recitals and admissions in deeds is this: "If made for the purpose of influencing the conduct of, or of deriving a benefit from, another, so that it cannot be denied without a breach of good faith, the law enforces the rule of good morals as a rule of policy, and precludes the party from repudiating his representations, or denying the truth of his admissions."[2] It is upon this ground, that if a party convey land describing it as bounded on a street, he is estopped to deny that such a street existed, or that the grantor might use it in connection with the land granted.[3] But such grantor would not be bound, by such recital, to grade or fit the way for travel.[4] So where the deed recited that certain conveyances had been made, the grantor could not afterwards deny that they had been made, nor could one deny this who claimed under such grantor.[5] And any party who traces his title through a regularly executed conveyance is concluded by its recitals.[6] The estoppel prevents a grantor from denying, not only the effect of his own deed, but every fact recited therein.[7] But the rule does not extend to that which is mere description, or an averment which is not essential.[8]

[1] Clark *v.* Baker, 14 Cal. 612; Jackson *v.* Murray, 12 Johns. 201; Jackson *v.* Bull, 1 Johns. Cas. 90; Van Rensselaer *v.* Kearney, 11 How. 322.

[2] Douglass *v.* Scott, 5 Ohio, 197; Rawle, Cov. 407; French *v.* Spencer, 21 How. 228.

[3] Parker *v.* Smith, 17 Mass. 413; Emerson *v.* Wiley, 10 Pick. 310; O'Linda *v.* Lothrop, 21 Pick. 292; Tufts *v.* Charlestown, 2 Gray, 271; Farnsworth *v.* Taylor, 9 Gray, 162; Rodgers *v.* Parker, 9 Gray, 445; Thomas *v.* Poole, 7 Gray, 83; Loring *v.* Otis, 7 Gray, 563; Stetson *v.* Dow, 16 Gray, 373; Dawson *v.* St. Paul's F. & M. I. Co., 15 Minn. 136; Cox *v.* James, 45 N. Y. 562; Gaw *v.* Hughes, 111 Mass. 296; Seibert *v.* Graff, N. J. Eq. ; s. c. 38 Atl. Rep. 970.

[4] Hennessey *v.* Old Colony R. R., 101 Mass. 540.

[5] Kinsman *v.* Loomis, 11 Ohio, 475, 478; 2 Smith, Lead. Cas. (5th Am. ed.) 460; Rangely *v.* Spring, 28 Me. 142; Farrar *v.* Cooper, 34 Maine, 401; Denn d. M'Donald *v.* King, 1 N. J. 432; Doe d. Jefferson *v.* Howell, 1 Houst. 183.

[6] Scott *v.* Douglass, 7 Ohio, 227; Carver *v.* Jackson, 4 Pet. 85; Hall *v.* Orvis, 35 Iowa, 366.

[7] Stow *v.* Wyse, 7 Conn. 214; Green *v.* Clark, 13 Vt. 158; Douglass *v.* Scott, 5 Ohio, 199; Van Rensselaer *v.* Kearney, 11 How. 322; Clark *v.* Baker, 14 Cal. 629; Hagenrick *v.* Castor, 53 Neb. 495; s. c. 73 N. W. Rep. 932.

[8] Osborne *v.* Endicott, 6 Cal. 153.

§ 1919. **Illustration.** — The whole law, as to the effect of recitals in deeds in the matter of estoppel, is considered in the case of Douglass *v.* Scott, which can only be understood by a full statement of the circumstances which raised the question. One Massie made a deed to the heirs of one Montgomery, who had entered under an agreement for a deed, and died in possession of the land. The heirs conveyed to Kerr by deed in usual form, with warranty, reciting the patent to Massie, and Massie's deed to them; and Kerr entered under this deed. Massie never had received his patent; and having died, it now was for the first time issued to his heirs. Douglass, prior to 1816, obtained a judgment and creditor's lien on the land against Kerr, which was kept alive; and he sold the land in 1821, and acquired a title under this sale. In 1816, Kerr mortgaged the estate, and in his deed recited the title by patent in Massie, the sale by Massie to the Montgomery heirs, and their conveyance to him, Kerr. The land was sold under this mortgage, and purchased by Scott, in 1823; and Kerr released to him, as did the trustees of the heirs of Massie, to whom the patent had issued. It turned out, moreover, that the deed from Massie to the Montgomery heirs was invalid for want of proper attestation. Under these circumstances, Douglass brought a bill in equity to quiet his title. The court say: "The obligation created by estoppel not only binds the party making it, but all persons privy to him, — the legal representatives of the party, — those who stand in his situation by act of law, and all who take his estate by contract entered into in his stead, are subjected to all the consequences which accrue to him. It adheres to the land; is transmitted with the estate; it becomes a muniment of title; and all who afterwards acquire the title take it subject to the burden which the existence of the fact imposes on it." They therefore held, in the first place, that Douglass acquired the legal title of Kerr by the sale under the judgment. In the next place, they held that the recital in Kerr's deed from Montgomery's heirs, that Massie had received a patent and had conveyed the estate to them, was one upon which he, Kerr, had a right to hold them bound, as an admission of the fact by which, as a party to the deed, he was himself bound;

and that Kerr's assignee, claiming under him, was alike concluded: that the land was patented to Massie, and conveyed by him to the Montgomery heirs, was proved by their admission while they were owners and were disposing of the estate, "upon which all persons deriving title under them have a right to rely, and which conclude all persons to whom their estate is transmitted;" and "that neither party, deriving title through this deed, is at liberty to question these facts." They accordingly held that Douglass had the better title.[1]

§ 1920. **Recitals in a Will.** — It is stated generally, that recitals in a will operate as an estoppel to parties claiming under it.[2]

§ 1921. **Void Deed works no Estoppel.** — There are a few exceptions to the effect given to recitals in deeds, one of which is found in the case where the deed containing the recital is, upon its face, a void one. There it does not work an estoppel.[3] So if it be inoperative from any cause, as for want of proper execution, even if it contain covenants of warranty.[4] And though a party claiming title under a deed is barred by the recitals in such deed, he may show that the deed in which they are contained is inoperative, defective, and void.[5]

§ 1922. **No Estoppel until Deed takes Effect.** — Another exception to the application of this rule is, where the other party who would enforce the estoppel proposes to go behind the deed which contains the recitals, to defeat it. As where one holding a mortgage took a deed of release from the mortgagor, reciting that its object was to cancel the mortgage, and a third person claimed title to the same land through an attachment laid upon it between the date of the mortgage and that of the deed of release, the grantee, in such deed of release, was permitted to show that he still held under the mortgage

[1] Douglass *v.* Scott, 5 Ohio, 197. See also M'Cleskey *v.* Leadbetter, 1 Ga. 551; Denn d. Woolley *v.* Brewer, 1 N. J. 172; Denn *v.* King, id. 432; Kinsman *v.* Loomis, 11 Ohio, 475.

[2] Denn *v.* Cornell, 3 Johns. Cas. 174.

[3] Sinclair *v.* Jackson d. Field, 8 Cow. 587; Wallace *v.* Miner, 6 Ohio, 366; Concord Bank *v.* Bellis, 10 Cush. 276; Lowell *v.* Daniels, 2 Gray, 161; Cuthbertson *v.* Irving, 4 Hurlst. & N. 754.

[4] Patterson *v.* Pease, 5 Ohio, 190–192.

[5] Blake *v.* Tucker, 12 Vt. 39.

by an agreement with the debtor to await the result of the attachment.[1]

§ 1923. **Conveyance by Tenants in Common.** — If a deed be made by several owners of an estate in common, whatever recitals as to title it contains will estop each grantor as to his own share only, and not as to the title of his co-grantors.[2]

§ 1924. **Strangers not benefited.** — A stranger to a deed can never set up the recitals therein, by way of estoppel, as against a party to the deed.[3]

§ 1925. **No Title not in Esse can pass except by Estoppel.** — No title not *in esse* will pass by deed unless this contain a warranty or an assertion of title express or implied on the part of the grantor, in which case it operates as an estoppel as to any after-acquired title.[4]

§ 1926. **Deeds which do not import Assertion of Title.** — It is further held that the words "granted, bargained, sold, and released," in a deed, do not amount to an estoppel as to any future estate, nor do any of the deeds which take effect by virtue of the statute of uses.[5]

§ 1927. **Of Estoppel by Deed with Warranty.** — The most striking instances of an estoppel by deed are those where a party, without any title to land, undertakes to convey it, covenanting as to the title, and afterwards acquires title to the same land by descent or purchase.[6] If his covenant is such, of warranty, for instance, as to entitle the covenantee to recover for its breach just as much of the covenantor as he, the covenantor, would recover of the tenant, the covenantee, if he prevailed by enforcing his claim to the land, the law, to avoid circuity of action, allows the tenant to avail himself of this

[1] Crosby *v.* Chase, 17 Me. 369.

[2] Sunderlin *v.* Struthers, 47 Penn. St. 423.

[3] Allen *v.* Allen, 45 Penn. St. 473.

[4] Jackson d. M'Crackin *v.* Wright, 14 Johns. 193; Dart *v.* Dart, 7 Conn. 250; 2 Smith, Lead. Cas. (5th Am. ed.) 624; Somes *v.* Skinner, 3 Pick. 52, 61; Blanchard *v.* Brooks, 12 Pick. 47.

[5] Burt. Real Prop. § 593, note; Wms. Real Prop. 329, note; Jackson d. M'Crackin *v.* Wright, 14 Johns. 193; Jackson d. Jones *v.* Brinckerhoff, 3 Johns. Cas. 101; Rawle, Cov. (3d ed.) 407; 2 Smith, Lead. Cas. (5th Am. ed.) 624; Brown *v.* Jackson, 3 Wheat. 449; Kimball *v.* Blaisdell, 5 N. H. 535; Clark *v.* Baker, 14 Cal. 612; Dart *v.* Dart, 7 Conn. 250.

[6] Nunnally *v.* White, 3 Met. (Ky.) 589.

covenant to rebut the covenantor's claim upon the land, and prevent the grantor from setting up a claim to the estate by his after-acquired title. Or it may be placed perhaps more properly, as it is sometimes insisted, upon the ground that the warranty of a grantor is as if a particular recital or averment had been inserted in his deed, and he was thereby estopped by his deed from denying its efficacy.[1] A made two mortgages in succession, one to his son, and another to B, with covenants of warranty. His son died, and, as his heir, he became entitled to the mortgage. But it was held that he could not, as assignee of his son, claim against his own mortgage to B and the covenants therein.[2] This doctrine of after-acquired title enuring to the benefit of a prior grantee is applied in Louisiana to mortgages; so that if one mortgages land without having any title to the estate, and afterwards acquire one, it enures to the benefit of the mortgagee.[3] But without stopping to discuss the precise manner in which this is effected, the cases are numerous establishing the general principle that such is the effect, although they do not agree in the point whether certain of the usual covenants in deeds do or do not operate to work estoppels against the covenantors. The subject may hereafter be resumed, when the covenants in deeds are considered. For the present, it will be sufficient to refer to a few of the leading authorities upon the subject, without undertaking, generally, to draw a line between a technical rebutter and an estoppel, which the reader will find elaborately discussed by Mr. Rawle, in the ninth chapter of his valuable treatise on Covenants for Title.[4] Lord Coke, in treating of a release, while commenting upon Littleton's statement, that "no right passeth by a release but

[1] Rawle, Cov. (3d ed.) 422; Co. Lit. 265 *a*; Dart *v.* Dart, 7 Conn. 256; Jackson d. Thurman *v.* Bradford, 4 Wend. 619; 4 Kent, Com. 261, note; 2 Smith, Lead. Cas. (5th Am. ed.) 626, 627; Somes *v.* Skinner, 3 Pick. 52, 61; Oake *v.* Marcy, 10 Pick. 195, 199; White *v.* Patten, 24 Pick. 324. See Blanchard *v.* Ellis, 1 Gray, 195; Jackson *v.* Hubble, 1 Cow. 613, 617; Jackson d. Varick *v.* Waldron, 13 Wend. 189; Kimball *v.* Blaisdell, 5 N. H. 535; Bogy *v.* Shoabs, 13 Mo. 378; Wade *v.* Lindsey, 6 Met. 413; Cole *v.* Raymond, 9 Gray, 217; Mickles *v.* Townsend, 18 N. Y. 577; Irvine *v.* Irvine, 9 Wall. 625; Randall *v.* Lower, 98 Ind. 255.

[2] Lincoln *v.* Emerson, 108 Mass. 90, 91.

[3] Amonett *v.* Amis, 16 La. Ann. 227.

[4] Rawle, Cov. c. 9.

the right which the releasor hath at the time of the release made," speaks of a release accompanied by a warranty, and remarks: "The warranty may rebut and bar him (the warrantor) and his heirs of a future right which was not in him at the time." He puts the case of a grandfather, father, and son, where the father disseises the grandfather, and then makes a feoffment in fee, and the grandfather afterwards dies. The father, in such a case, might not enter upon his feoffee against his own feoffment, though the son might upon his death. It is said there is no English authority that any other conveyance than a feoffment, fine, or lease operates by way of estoppel to pass an after-acquired title.[1] "And so note a diversity between a release, a feoffment, and a warranty. A release, in that case, is void. A feoffment is good against the feoffor, but not against his heirs. A warranty is good both against himself and his heirs." [2]

§ 1928. **Effect of Release with Warranty.** — The same doctrine is adopted in Connecticut; though there is this difference between a release there and in England, that in the latter it is a secondary conveyance, deriving its validity and effect from the possession of the releasee; in the former it is a primary one, and passes the releasor's right like a grant, and operates as a conveyance, without a warranty. If made with a warranty, the releasor is estopped to claim the land. The same principle applies in New York [3] and Massachusetts.[4]

§ 1929. **How Covenants operate on the Title.** — The cases are numerous where courts have held, that if one without any title makes a deed of land with covenants of warranty, and afterwards acquires a title to the same, it will enure to the grantee and covenantee by way of estoppel.[5] And in several States the

[1] Gibson *v.* Chouteau, 39 Mo. 566; Valle *v.* Clemens, 18 Mo. 486.

[2] Co. Lit. 265 *a*.

[3] Dart *v.* Dart, 7 Conn. 256; Jackson d. M'Crackin *v.* Wright, 14 Johns. 193.

[4] Trull *v.* Eastman, 3 Met. 121; Butler *v.* Seward, 10 Allen, 468.

[5] Jackson d. Stevens *v.* Stevens, 13 Johns. 316; Jackson d. Benson *v.* Matsdorf, 11 Johns. 91; Somes *v.* Skinner, 3 Pick. 52, 60; Terrett *v.* Taylor, 9 Cranch, 43; Wark *v.* Willard, 13 N. H. 389; Comstock *v.* Smith, 13 Pick. 116, 119; Trull *v.* Eastman, 3 Met. 121, 124; White *v.* Patten, 24 Pick. 324; Allen *v.* Parish, 3 Ohio, 107; Bond *v.* Swearingen, 1 Ohio, 395; Lawry *v.* Williams, 13 Me. 281; Jackson d. Van Keuren *v.* Hoffman, 9 Cow. 271; 5 Prest. Abst. 210; Jackson d. M'Crackin *v.* Wright, 14 Johns. 193; Baxter *v.* Bradbury, 20 Me. 260; 2 Smith, Lead. Cas.

rule is recognized by statute. The effect is, that the title acquired by the grantor who has conveyed with warranty enures, *eo instanti* that he gains the title, to his grantee, and vests in him, or to the grantee of such grantee if with like covenants.[1] But if, before the covenantor acquires a title, the covenantee sue for a breach of the covenant of seisin, it seems that he could not defeat that action by purchasing in the title and tendering it to his covenantee, if the latter refuse to accept it. In the case cited below, the tender was made six years after the original deed.[2] In Blanchard *v.* Ellis,[3] the court held, that if one purchase with covenants of warranty, and the grantee is wholly evicted from the premises by a title paramount to the grantor's, he cannot, after such entire eviction, purchase this title paramount, and compel the grantee to take the same against his will, either in satisfaction of the covenant against incumbrances, or in mitigation of damages for the breach of it. It is held, moreover, that if an action to recover the land be brought against the grantee and covenantee, and he notify his warrantor to defend the suit, and he fails to do so, a verdict in the action against the tenant would be conclusive against the covenantor to show that the eviction was by a paramount title.[4] But if the title, in such a case, comes to the covenantor in the capacity of trustee, and not in his own right, it would not enure to the prior covenantee. The estoppel would not apply in such a case.

(5th Am. ed.) 626, for a collection of American cases to the same effect ; Blanchard *v.* Ellis, 1 Gray, 198 ; Clark *v.* Baker, 14 Cal. 630 ; Van Rensselaer *v.* Kearney, 11 How. 322 ; Perry *v.* Kline, 12 Cush. 118 ; Goodson *v.* Beacham, 24 Ga. 150 ; O'Bannon *v.* Paremour, id. 489 ; Chamberlain *v.* Meeder, 16 N. H. 381 ; 12 Am. Law Reg. 147, note ; King *v.* Gilson, 32 Ill. 353 ; Dobbin *v.* Cruger, 108 Ill. 188 ; Kimball *v.* Schoff, 40 N. H. 190 ; Burton *v.* Reeds, 20 Ind. 93 ; McCusker *v.* McEvey, 9 R. I. 528, correcting a dictum in Gardner *v.* Green, 5 R. I. 104 ; Plimpton *v.* Converse, 42 Vt. 712 ; Doe d. Potts *v.* Dowdall, 3 Houst. 369 ; Bush *v.* Marshall, 6 How. 291 ; Johnson *v.* Branch. 9 S. Dak. 116 ; s. c. 68 N. W. Rep. 173 ; s. c. 62 Am. St. Rep. 857 ; Baldwin *v.* Root, 90 Tex. 546 ; s. c. 40 S. W. Rep. 3.

[1] Crocker *v.* Pierce, 31 Me. 177, 182.

[2] Tucker *v.* Clarke, 2 Sandf. Ch. 96.

[3] 1 Gray, 199.

[4] McConnell *v.* Downs, 48 Ill. 272.

[5] Burchard *v.* Hubbard, 11 Ohio, 316 ; Kelley *v.* Jenness, 50 Me. 455, 464 ; Sinclair *v.* Jackson d. Field, 8 Cow. 587 ; Jackson d. Van Keuren *v.* Hoffman, 9 Cow. 273 ; Jackson d. Whitlocke *v.* Mills, 13 Johns. 463.

§ 1930. **Estoppel only as broad as the Covenant.**— The covenant need not be a general covenant of warranty, but will always work an estoppel to the extent of its terms. Thus, where there was a covenant of warranty against a particular title which the grantor afterwards acquired, he was estopped to set it up.[1] So where one conveys with covenant against incumbrances, and afterwards buys in an outstanding mortgage, or purchases the estate under a sale for foreclosure of a mortgage existing thereon prior to his conveyance, whatever title he acquires thereby enures to the benefit of his grantee.[2]

§ 1931. **Covenant must run with the Land.** — But a covenant, to have this effect, must be something more than the personal covenant of him who makes it. It must be of a nature to run with the land; and if it be, it will attach to the land, and run with it, the instant the covenantor acquires the title which he has undertaken to convey by his deed.[3]

§ 1932. **The Covenantee may estop himself** from setting up the covenant of his grantor by the way of claiming the estate. If the purchaser, under a deed with general covenants of warranty, be evicted by a better title, it is not in the grantor's power afterwards to acquire a title to the premises, and compel the grantee to accept the same against his will. Whether the grantee has the election, after such eviction, to claim such acquired title by estoppel, the court, in the case cited, avoid determining. But if, instead of claiming the land, the purchaser sues upon his covenants, and recovers damages for a breach thereof, he would be estopped thereby from claiming the land by estoppel, though his grantor and covenantor should have acquired it.[4]

§ 1933. **Covenantor may disseise Grantee.** — Nor will such covenant prevent the grantor from subsequently acquiring a title to the granted premises, and availing himself of it against his own grantee, if the title conveyed by such grant was, at

[1] Blake *v.* Tucker, 12 Vt. 39; Trull *v.* Eastman, 3 Met. 121; Kimball *v.* Blaisdell, 5 N. H. 535; Sanford *v.* Sanford, 135 Mass. 314.

[2] Brundred *v.* Walker, 12 N. J. Eq. 140.

[3] Patterson *v.* Pease, 5 Ohio, 190, 192; Trull *v.* Eastman, 3 Met. 121; Wheelock *v.* Henshaw, 19 Pick. 341; 2 Smith, Lead. Cas. (5th Am. ed.) 640.

[4] Blanchard *v.* Ellis, 1 Gray, 195; Porter *v.* Hill, 9 Mass. 34. See Baxter *v.* Bradbury, 20 Me. 260.

the time, a good one. Thus, where the grantor disseised his own grantee, and held adverse possession for twenty years, it was held that he was not estopped by his former deed and covenant to claim title to the premises by such disseisin.[1]

§ 1934. **Covenants limited by Estate granted.** — So the effect of the covenant will be limited in its extent by the premises granted, and with which it may run; as where the grantor, owning one undivided sixth part of certain premises, conveyed all his estate in the premises, and covenanted against the claims of all persons to the estate, he was only estopped as to his sixth, and not as to any other shares which he afterwards acquired.[2] So, where there was a recital of an outstanding mortgage in a deed of the premises, with covenants of warranty, it was held that the covenant was qualified by such recital.[3] Upon this ground where the grant is in the form of a release and quitclaim of all the grantor's right, claim, or title to the land described, with a covenant of warranty against all persons claiming by or under him, while he would be thereby estopped to claim any title existing in him at the time of making his deed, he would not be as to any after-acquired title.[4] The reader will remark the distinction between this case and that where the grantor conveys the land or estate itself, without limiting his conveyance to such right as he has. So that the cases cited below do not conflict with the doctrine of estoppel stated in some of the former cases, that a man may not aver anything contrary to his express recitals in his deed, and, after having expressly conveyed land itself to which he has no title, afterwards avoid his own deed by claiming the land under a subsequently acquired title. So where one who took by devise a vested remainder in a certain part of an estate, and a contingent remainder in another part, granted, bargained, and sold all his right, title, and interest in the estate, with cove-

[1] Stearns *v.* Hendersass, 9 Cush. 502; Parker *v.* Merrimac Locks, 3 Met. 102; Smith *v.* Montes, 11 Tex. 24; Tilton *v.* Emery, 17 N. H. 538.

[2] Wight *v.* Shaw, 5 Cush. 56; Trull *v.* Eastman, 3 Met. 121, 123.

[3] Jackson d. Van Keuren *v.* Hoffman, 9 Cow. 271.

[4] Comstock *v.* Smith, 13 Pick. 116, 119, 120; Jackson d. Peek *v.* Peek, 4 Wend. 300; Miller *v.* Ewing, 6 Cush. 34, 40; Kinsman *v.* Loomis, 11 Ohio, 475; Ham *v.* Ham, 14 Me. 351; Coe *v.* Persons Unknown, 43 Me. 432; Pike *v.* Galvin, 29 Me. 183; Doane *v.* Wilcutt, 5 Gray, 328, 333; Harriman *v.* Gray, 49 Me. 538; Bennett *v.* Davis, 90 Me. 457; s. c. 38 Atl. Rep. 372.

nants of warranty, it held that the grant was answered by the vested interest he had, and did not estop him from claiming that part in which he had a contingent remainder, which subsequently became vested in interest and possession.[1]

§ 1935. **Deed must be fair on its Face, and inoperative.** — It is upon the grounds above stated that it has been held, that, in order to bar a party by his covenant of warranty, not only must the deed be a good and valid deed in its form and mode of execution,[2] but it must convey no title to the premises, nor pass anything upon which the warranty can operate; for, if it passes a title or interest, the covenant does not operate as an estoppel, even though it cannot operate upon the interest to the full extent of the intention of the parties.[3]

§ 1936. **Estoppels apply to Leases for Years.** — This doctrine of estoppels applies also to leases for years, and, it would seem, with greater force, if possible, than to deeds poll. Thus, if a person execute an indenture purporting to *demise* land for a term, in which he has no estate in fact, or no estate by a good legal title, and the want of such estate does not appear upon the instrument, the lease will operate upon any interest which he may afterwards acquire in the same land during the continuance of the term. But it is requisite that it should be an indenture, in order to bind both parties, and make the estoppel reciprocal; while if any valid interest, however short it may be of that pretended, actually passes from the lessor to the lessee, the lease works no estoppel against him.[4]

[1] Blanchard *v.* Brooks, 12 Pick. 47, 66; Wynn *v.* Harman, 5 Gratt. 157; White *v.* Brocaw, 14 Ohio St. 344.

[2] By the term "interest," as above used, it seems, is intended a *vested* interest. Blanchard *v.* Brooks, 12 Pick. 47; 2 Saund. 388 *d*; 2 Prest. Abst. 410; Patterson *v.* Pease, 5 Ohio, 190; Kercheval *v.* Triplett, 1 A. K. Marsh. 493; Dougal *v.* Fryer, 3 Mo. 40.

[3] Lewis *v.* Baird, 3 McLean, C. C. 56, 78, 79; 4 Kent, Com. 98; Jackson d. Van Keuren *v.* Hoffman, 9 Cow. 271; 2 Prest. Abst. 216. The doctrine of the text is controverted by Grover, J., in Moore *v.* Littel, 41 N. Y. 97. But *quære*, if, in the case he supposes of a termor conveying the estate in fee with covenants, he is estopped, is it not rather by way of rebutter than a technical estoppel?

[4] Shep. Touch. Prest. ed. 53; Burt. Real Prop. § 850; Wms. Real Prop. 229, 230; Hermitage *v.* Tomkins, 1 Ld. Raym. 729; 4 Kent, Com. 261 and note; Jackson d. Rensselaer Co. *v.* Bull, 1 Johns. Cas. 90; Co. Lit. 47 *b*; 2 Prest. Abst. 410. See Iseham *v.* Morrice, Cro. Car. 109. "Grant and demise," in an indenture of lease, are equivalent to covenants of warranty and of quiet enjoyment. Barney

§ 1937. **Extent of Estoppels.** — Estoppels operate neither in favor of nor against strangers, but affect only parties and privies in blood, in estate, or in law; and a stranger can neither take advantage of, nor be bound by, an estoppel,[1] though it is not always easy to draw the line between privies and strangers. Accordingly, where one who had been disseised conveyed the land by deed to a stranger, and then sued his disseisor for possession, it was held that his deed to a stranger did not estop him from maintaining the action.[2] So where the deed to the stranger passed nothing for want of proper execution, the tenant, not a party to it, cannot avail himself of it.[3]

§ 1938. **Who bound as Privy in Estate.** — But a person in possession, sustaining his possession by no other title than a denial that a former owner had parted with his right, is not a stranger. He becomes privy in estate to him whose title he maintains, and is concluded by what destroys that in his hands. For if title can be traced by B to A, and B can fasten upon A the incapacity of asserting his right in consequence of his admission that he has conveyed to B, it is not just that one standing on A's claim only, and relying on no superior right, should be permitted to contest the existence of a fact which those interested have settled.[4]

§ 1939. **First Grantee has Benefit of Estoppel as against Subsequent Grantee.** — So where one conveys lands with warranty, but without title, and afterwards acquires one, his first deed works an estoppel, and passes an estate to the grantee the instant the grantor acquires his title, not only against the grantor and those claiming under him, but also against stran-

v. Keith, 4 Wend. 502. A, tenant for life of B, makes a lease for twenty years, and then buys the reversion. B then dies. A may enter and avoid his own lease. But had he had no title when he made the lease, and he then acquired one, he could not have contradicted his own lease. See Wms. Real Prop. 330.

[1] Doe d. Marchant *v.* Errington, 6 Bing. N. C. 79; Jackson d. Rensselaer Co. *v.* Bull, 1 Johns. Cas. 90; Jackson d. Jones *v.* Brinckerhoff, 3 Johns. Cas. 103; Miller *v.* Holman, 1 Grant's Cas. 243; Jackson d. Thurman *v.* Bradford, 4 Wend. 623; Kimball *v.* Blaisdell, 5 N. H. 535; Sunderlin *v.* Struthers, 47 Penn. St. 423.

[2] Wolcot *v.* Knight, 6 Mass. 418; Jackson d. Jones *v.* Brinckerhoff, 3 Johns. Cas. 103.

[3] Patterson *v.* Pease, 5 Ohio, 190.

[4] Kinsman *v.* Loomis, 11 Ohio, 478; Easter *v.* Little Miami R. R. Co., 14 Ohio St. 52, 54; Morse *v.* Aldrich, 19 Pick. 449; Whatman *v.* Gibson, 9 Sim. 196.

gers who come in after the deed creating the estoppel.[1] And such title would enure to the benefit of the first grantee by estoppel, to the exclusion of a second grantee, to whom the grantor shall execute a deed after having acquired a title;[2] though it has been insisted that such a construction does violence to the spirit of the system of registration of deeds, which ordinarily requires, that, in taking a title, one should only go back to the time his grantor acquired it, and to see that no *intermediate* incumbrance or conveyance shall have been made by him.[3]

§ 1940. **Estoppel of Grantor binds Grantee.** — It may, accordingly, be stated as a general proposition, that any person claiming under one who is bound by an estoppel is himself bound by the same estoppel.[4] Thus, in the case of Wark *v.* Willard, above cited, a purchaser from one who had made a prior deed with warranty of land to which he afterwards had acquired a title was estopped by the first deed as well as his grantor, although it had never been recorded, provided he had notice of its existence when he took his deed. Where A, by a deed of mortgage with warranty, conveyed his estate, upon which there was an outstanding mortgage, and A purchased this, and took an assignment of it to himself in his own right, it was held that this latter mortgage enured to the benefit of A's mortgagee with covenants.[5] But if, after having made a conveyance with warranty without having title, the estate comes to him as a mere conduit in passing it from its owner through him to another person, it does not enure to the benefit of his original grantee.[6]

§ 1941. **Married Women and Infants.** — While the deed of a married woman, if executed in accordance with the statute, operates to bar dower and to pass estates *in esse* by way of

[1] Somes Skinner, 3 Pick. 52, 60.

[2] White *v.* Patten, 24 Pick. 324; Bigelow, Estoppel, 359. But see Chamberlain *v.* Meeder, 16 N. H. 381. If mortgaged back at the same time with the purchase, the mortgage would take precedence of the title by estoppel.

[3] Rawle, Cov. (3d ed.) 430.

[4] Phelps *v.* Blount, 2 Dev. 177. See Douglass *v.* Scott, 5 Ohio, 197; Wark *v.* Willard, 13 N. H. 389; Maple *v.* Kussart, 53 Penn. St. 351.

[5] Kelley *v.* Jenness, 50 Me. 455.

[6] Kelley *v.* Jenness, *supra;* Runlet *v.* Otis, 2 N. H. 167; Marsh *v.* Rice, 1 N. H 167.

estoppel, yet the prevailing doctrine of the common law is that such deed, even with covenants of warranty, will not pass an after-acquired title; although it is otherwise where, by statute, she is allowed to make valid contracts and conveyances.[1] [The rule as stated also applies to her equitable estates, as to which she is regarded as a *feme sole*.[2] But where she joins in her husband's deed merely to release dower, she will not be estopped by the covenants to assert any title in her own right.[3] Infants are not estopped by their deeds unless they ratify them after majority.[4]]

§ 1942. **Representative Grantors, Agents, etc.** — The doctrines of estoppel by deed, both as to recitals and warranties, apply to attorneys in fact, and persons who execute deeds in a representative capacity. As where one made a deed of land belonging to a corporation, in which he described himself as agent, duly authorized to convey, etc.; although this was not true. After that, he sued and recovered judgment against the company, and levied his execution upon the same land as belonging to the company, and then brought his action to recover the land from the grantee under the deed which he had executed as agent. It was held that he was estopped to deny that he was the authorized agent, and that all persons claiming through or under him were equally estopped.[5] So where land originally belonging to G. C. became, as was assumed, the property of T. F. by conveyance, who gave G. C. a power of attorney to convey any land then belonging to T. F., and G. C., under that power, and as the attorney of T. F., conveyed the land in question to the tenant, it was held that the heirs of G. C., after his death, were estopped by this sale to set up a claim to the land, on the ground, that, when G. C. made the deed as T. F.'s attorney, T. F. was not the owner of the land, but that the same, in fact, belonged to

[1] Wight *v.* Shaw, 5 Cush. 56; Lowell *v.* Daniels, 2 Gray, 168; Bank of America *v.* Banks, 101 U. S. 240; Patterson *v.* Lawrence, 90 Ill. 174; Knight *v.* Thayer, 125 Mass. 25; Childs *v.* McChesney, 20 Iowa, 431; Nunnally *v.* White, 3 Met. (Ky.) 593; O'Neil *v.* Vanderburg, 25 Iowa, 107.

[2] Jones *v.* Reese, 65 Ala. 134; Krauth *v.* Thiele, 45 N. J. Eq. 407; s. c. 18 Atl. Rep. 351.

[3] Trentman *v.* Eldridge, 98 Ind. 531.

[4] Cook *v.* Toumbs, 36 Miss. 685.

[5] Stow *v.* Wyse, 7 Conn. 214. See also Huntington *v.* Havens, 5 Johns. Ch. 23

G. C. The attorney, in such a case, is estopped to dispute the title of his principal, for whom he acts.[1] So where one, as guardian, conveyed lands, and entered into covenants of warranty as to the title in his deed, he was held to be thereby estopped from setting up a personal claim to the same land under his own title.[2]

§ 1943. **The State.** — The doctrine of estoppel by deed does not apply to the State so as to pass an after-acquired title.[3]

[1] Harney *v.* Morton, 36 Miss. 411.

[2] Heard *v.* Hall, 16 Pick. 457 ; Hitchcock *v.* Sou. Iron & T. Co., Tenn. ; s. c. 38 S. W. Rep. 588; Wills *v.* Steckelberg, 52 Neb. 597; s. c. 72 N. W. Rep. 865.

[3] Casey's Lessee *v.* Inloes, 1 Gill, 430; s. c. 39 Am. Dec. 658 ; Doe d. Wallace *v.* Maxwell, 10 Ired. L. 110 ; s. c. 51 Am. Dec. 380.

CHAPTER XCIV.

TITLE BY POSSESSION AND LIMITATION.

§ 1944. Definition.
1945. Possession *prima facie* evidence of title.
1946. Possession ripening into absolute title.
1947. Nature of seisin.
1948. Of disseisin.
1949. Disseisin at the election of disseisee.
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§ 1944. **Definition.** — "Title by possession is the title by which the possessor of land, after a certain period of possession, acquires an estate in such land." [1]

§ 1945. **Possession prima facie Evidence of Title.** — Possession is an element of title, and whoever is in possession of real property is so far regarded by law as the owner thereof, that no one can lawfully dispossess him of the same, without showing some well-founded title of a higher and better character than such possession itself furnishes.[2]

§ 1946. **Possession ripening into Absolute Title.** — Possession, however naked, may become an absolute title, or conclusive evidence of a title, under the operation of that policy of the law, which, for the peace of the community, does not allow a possession to be questioned, after it shall have been enjoyed for such a length of time as renders it unreasonable, in the eye of the law, to require evidence, *aliunde*, that it was holden under a right of ownership derived from some other sufficient and legitimate source. What this time shall be is regulated by rules prescribed by statute, varying according to the judgment of each particular State, expressed through its legislation. But, as will more fully appear in the sequel, in order that a possession of lands should have the effect which is above suggested, it must be maintained during the requisite period of time, as a right resulting from an exclusive property in, and dominion over, the estate, and not subordinate to the will of any other person. Such a possession as this would answer to the common law notion of seisin, and is of even broader significance, since it implies the seisin of an estate in fee-

[1] This pithy definition is borrowed from Prof. William C. Robinson's invaluable work on Elementary Law, § 133.

[2] 2 Sharsw. Bl. Com. 196 and note; Wood, Civil Law, 78, 126.

simple; while, at common law, seisin may be predicated of any freehold estate, whether of inheritance or not.[1]

§ 1947. **Nature of Seisin.** — There can be but one actual seisin of an estate. It may be held by several persons at the same time; but it is still in itself one and indivisible. Two persons cannot be actually seised of the same land, claiming it by title adverse to each other. So there may be what answers to actual seisin when used in respect to expectant estates like reversions, dependent upon estates to which the immediate, actual seisin is united. But that is not the seisin which grows out of the possession of land, and constitutes him in whom it is vested the recognized tenant of the freehold, within the meaning and theory of the feudal and common law.[2]

§ 1948. **Of Disseisin.** — Now, if any one usurps this right of seisin and possession, and exercises the powers and privileges of such tenant of the freehold, and thereby keeps out or displaces him to whom these rightfully belong, he is, in the eye of the law, a disseisor. And an infant may be a disseisor by entering and holding possession.[3] Of course, to complete the disseisin, that is, to divest the seisin from the one and invest the other with it, there was originally required to be such a recognition of the disseisor by the lord under whom he claimed to hold, and by the other tenants, as constituted him one of the *pares curiæ* of the lord's court, thus rendering an actual disseisin a complex operation, involving something more than the mere tortious act of entry by one upon another's possession, whereby the latter was deprived of that which he had hitherto enjoyed; though it will not be attempted to show precisely how this was accomplished.[4] Though there are no such tests at the present day to determine whether a tenant has been disseised or not as might have been applied while the feudal organization of manors, with their incidents, continued in force, yet the same general

[1] For the definition of seisin, and how it might be acquired and lost, see *ante*, § 91 *et seq.*

[2] Com. Dig. Seisin, A. 1, A. 2; Cornell *v.* Jackson, 3 Cush. 508.

[3] Lackman *v.* Wood, 25 Cal. 151.

[4] Co. Lit. 266 *b*, Butler's note, 217; 2 Prest. Abst. 284; Com. Dig. Seisin, F. 1; Ang. Lim. (2d ed.) 405.

notion is associated with an actual disseisin as prevailed under the feudal *régime*, that, as to all persons except him whose seisin has been wrongfully divested, the tenant is to be deemed the owner of the inheritance. And this is further sustained by the course of modern legislation, which forbids any one to question this ownership after a prescribed period of acquiescence.[1]

§ 1949. **Disseisin at the Election of Disseisee.** — Although, for purposes of remedy, if the dominion over, and free enjoyment of, the real property of any one is wrongfully interfered with or disturbed, he may, at his election, often treat the wrong-doer as a disseisor, although not himself actually ousted or dispossessed,[2] yet the act which makes one a disseisor by election is not an actual disseisin, such as will, under the effect of the statute of limitations, ripen into an indefeasible title to land.[3] But if the disseisee by election seeks to recover a judgment for title and possession against him whom he sues as a disseisor, he must abandon possession of the premises while the action is pending, otherwise the tenant may plead that the plaintiff has entered and disseised him, and thus abate the process.[4]

§ 1950. **Illustration.** — There was an entry upon and claim to land by one party; but being woodland, and unenclosed, the true owner was held not to be thereby in any manner dispossessed, the court saying: "It is true that two adverse parties cannot both be seised of the same land at the same time. But if A enters on the land of B, without ousting him, or doing some act equivalent to an ouster, he will not thereby acquire a seisin as against B, unless B elects to consider himself disseised; but A's possession would constitute a legal seisin against any one who might enter upon him and oust him without right."[5]

[1] Lund *v.* Parker, 3 N. H. 49; Newhall *v.* Wheeler, 7 Mass. 189; Slater *v.* Rawson, 6 Met. 439, 443; Coburn *v.* Hollis, 3 Met. 125, 128.

[2] Smith *v.* Burtis, 6 Johns. 215; 2 Prest. Abst. 287; Stearns, Real Act. 14; 2 Sulliv. Lec. 157; Taylor *v.* Horde, 1 Burr. 60; Prescott *v.* Nevers, 4 Mason, C. C. 329; Township No. 6 *v.* M'Farland, 12 Mass. 327.

[3] 4 Kent, Com. 485; Doe d. Souter *v.* Hull, 2 Dowl. & R. 38.

[4] Munroe *v.* Ward, 4 Allen, 150; Burns *v.* Lynde, 6 Allen, 312; Stearns, Real Act. 216.

[5] Slater *v.* Rawson, 6 Met. 439.

§ 1951. **How far Seisin and Possession are identical.** — "According to modern authorities, there seems to be no legal difference between the words *seisin* and *possession*, although there is a difference between the words *disseisin* and *dispossession;* the former meaning an estate gained by wrong and injury, whereas the latter may be by right or by wrong; the former denoting an ouster of the disseisee or some act equivalent to it, whereas by the latter no such act is implied." And in the language of the court in Mississippi, "Disseisin and ouster mean very much the same thing as adverse possession." [1]

§ 1952. **When Seisin follows Possession.** — It is accordingly held, that where two persons are in possession at the same time, under different claims of right, he has the seisin in whom is the true title. Both cannot be seised; and the seisin, consequently, follows the title.[2] If there is a mixed possession, but neither can show a better title, neither can bring trespass against the other.[3] But where there is no adverse holding, the possession follows the property in the land, and is in him who has the title.[4]

§ 1953. **There is a Seisin in Deed and a Seisin in Law**, and the difference between the two is, that in one case an actual possession has been taken, and in the other there is a right like that of an heir upon descent from his ancestor, while the possession is vacant, before he has made an actual entry.[5]

§ 1954. **Constructive Possession.** — There is also a *constructive* possession without being a possession *in fact*, if accompanied by an entry under "color of title," as it is called. As where one, under a title-deed describing a parcel by metes and bounds, enters upon the premises, claiming to hold the same under his deed, he is constructively in possession of all that is

[1] Slater *v.* Rawson, 6 Met. 439, 444. See Smith *v.* Burtis, 6 Johns. 216, 217; Ang. Lim. (2d ed.) 410; Magee *v.* Magee, 37 Miss. 151.

[2] Barr *v.* Gratz, 4 Wheat. 213; Smith *v.* Burtis, 6 Johns. 218; Codman *v.* Winslow, 10 Mass. 146, 151; 2 Prest. Abst. 286, 290; 4 Kent, Com. 482; Anonymous, 1 Salk. 246; Den *v.* Hunt, 20 N. J. L. 491; Stevens *v.* Hollister, 18 Vt. 294; Ang. Lim. (2d ed.) 442; Whittington *v.* Wright, 9 Ga. 23; Brimmer *v.* Long Wharf, 5 Pick. 131.

[3] Tappan *v.* Burnham, 8 Allen, 70; Barnstable *v.* Thacher, 3 Met. 239.

[4] Holley *v.* Hawley, 39 Vt. 531.

[5] Co. Lit. 153; 2 Prest. Abst. 282.

included in his deed, though he actually occupies but a part; nor can he be disseised except by an actual entry and occupancy by another, and only to the extent of such occupancy. So the legal title to wild lands draws to it the possession, unless it has been interrupted by an actual entry and adverse possession by another.[1] Two persons cannot be in adverse, constructive possession of the same land at the same time.[2]

§ 1955. **Disseisin's Effect on the Title.** — "Disseisin," in the language of Mr. Preston, "is the privation of seisin. It takes the seisin or estate from one man and places it in another. It is an ouster of the rightful owner of the seisin. It is the commencement of a new title, producing that change by which the estate is taken from the rightful owner, and placed in the wrong-doer. Immediately after a disseisin, the person by whom the disseisin is committed has the seisin or estate, and the person on whom this injury is committed has merely the right or title of entry." "As soon as a disseisin is committed, the title consists of two divisions: first, the title under the estate or seisin; and, secondly, the title under the former ownership."[3]

§ 1956. **Intent essential to Disseisin.** — But to constitute an actual disseisin, there must not only be an unlawful entry upon lands, or, in technical words, an entry not *congeable*, but it must be made with an intention to dispossess the owner, as the act otherwise would be a mere trespass.[4] Thus it is said, the *quo animo*, in which the possession was taken, is a test of its adverse character; and before one's possession is pronounced adverse, it must be found that he intended to hold in hostility to the true owner. Possession, to be supported by the law, must be under a claim of right; and adverse possession must be strictly proved.[5] Where a party claims by a disseisin, ripened into a good title by lapse of time, as against the legal

[1] Young *v.* Herdic, 55 Penn. St. 172.

[2] Hodges *v.* Eddy, 38 Vt. 344, 345.

[3] 2 Prest. Abst. 284.

[4] Smith *v.* Burtis, 6 Johns. 218; 4 Kent, Com. 488; Bradstreet *v.* Huntington, 5 Pet. 439; Ewing *v.* Burnett, 11 Pet. 41; 2 Smith, Lead Cas. (5th Am. ed.) 519, n., 561; Clarke *v.* McClure, 10 Gratt. 305; Ang. Lim. (2d ed.) 408; Wiggins *v.* Holley, 11 Ind. 2.

[5] Grube *v.* Wells, 34 Iowa, 150.

owner, he must show an actual, open, exclusive, adverse possession of the land.[1] And all these elements are essential to be proved. Strictly speaking, the consent of the legal owner to an act of disseisin is a contradiction in terms. Disseisin, like trespass, is a tortious act, adverse in its nature, and in derogation of the right of the true owner.[2]

§ 1957. **Seisin regained by Re-entry.** — So a seisin once lost by disseisin may be regained by a re-entry by the disseisee upon the land, without turning the person in the actual seisin out of possession. But the entry in such case, to have this effect, must be of such a character, and accompanied by such notice, as clearly to indicate to the one in possession that his possession is invalid, and his right to the same challenged. A casual entry would not be sufficient.[3] In other words, the re-entry, in order to regain a seisin, must be done with that intent, and must be made upon some part of the land.[4] It is enough, however, that the owner goes upon the land with the intent thereby to regain his seisin. No formal declaration need be made upon the land; and a seisin thus gained authorizes the owner of the land to convey a good title to it, though, till this re-entry, he had been disseised.[5] And if the owner is again denied the occupation by the person in possession, it will be a re-disseisin.[6] As affecting the question of title, however, these principles are chiefly important in determining whether a title has been gained by adverse enjoyment for the requisite period since the time when the actual seisin was gained by the one, and lost by the other.

§ 1958. **Effect of Descent cast.** — So important was the effect of seisin deemed at common law as evidence of title, that, if one died actually seised, his seisin was at once cast upon his heir; and though the ancestor had acquired it by disseisin, the right of the disseisee to regain the seisin by an entry was lost, and he was driven to prove his title in an action at law for the recovery of his land, whereby alone he could rebut the

[1] Snoddy *v.* Kreutch, 3 Head, 304; Gordon *v.* Sizer, 39 Miss. 820.

[2] Per Bigelow, J., Cook *v.* Babcock, 11 Cush. 209, 210.

[3] O'Hara *v.* Richardson, 46 Penn. St. 390; Burrows *v.* Gallup, 32 Conn. 499.

[4] Peabody *v.* Hewett, 52 Me. 46.

[5] Brickett *v.* Spofford, 14 Gray, 514.

[6] 2 Prest. Abst. 292.

presumption that the seisin in the heir was lawful;[1] though this effect of a "descent cast" in "tolling the entry," as it was called, is pretty generally, if not universally, abrogated in this country, and was so far changed by the 32 Henry VIII. c. 33, that no descent cast would bar a right of entry for regaining seisin by a disseisee, unless the ancestor should have been in possession of the lands in question for the space of five years next after making disseisin thereof.

§ 1959. **An Abandonment by a Disseisor** of his possession of the estate operates a restoration of the seisin to the true owner,[2] unless the one who thus abandons is a joint-disseisor, in which case the other disseisor becomes sole seised.[3]

§ 1960. **Effect of Deed upon the Seisin.** — A deed duly executed, delivered, and recorded,[4] will, it is believed, in all the States, actually pass the seisin of the grantor of the estate thereby conveyed, unless himself disseised, without any formal entry, either by force of the express provisions of statutes, or of the doctrine of uses which prevails in most of the States to a greater or less extent, as will be shown hereafter when treating of titles by deed.[5] A recorded deed, however, does not disseise the owner of the land, unless the grantor occupies some part of the premises.[6] A warranty deed duly executed and recorded raises no presumption except between the parties, that the grantor had a title which he could convey, and that he had, by his deed, vested a seisin in the grantee;[7] although

[1] Co. Lit. 238 *a*; Smith *v.* Burtis, 6 Johns. 217.

[2] Melvin *v.* Proprs. Locks and Canals, 5 Met. 15, 32; Potts *v.* Gilbert, 3 Wash. C. C. 475; Sawyer *v.* Kendall, 10 Cush. 241, 245; Cleveland *v.* Jones, 3 Strobh. 479, n.

[3] Allen *v.* Holton, 20 Pick. 458; Ang. Lim. (2d ed.) 446.

[4] But it is only in exceptional cases that record of a deed is necessary to pass the grantor's seisin.

[5] Wells *v.* Prince, 4 Mass. 64, 68; Barr *v.* Gratz, 4 Wheat. 213; Green *v.* Liter, 8 Cranch, 229; 4 Dane, Abr. 85; Caldwell *v.* Fulton, 31 Penn. St. 475; Matthews *v.* Ward, 10 Gill & J. 443; Higbee *v.* Rice, 5 Mass. 344; Effinger *v.* Lewis, 32 Penn. St. 367; Brackenridge *v.* Ormsby, 1 J. J. Marsh. 244. So in New Brunswick. Wortman *v.* Ayles, 1 Hannay (N. B.), 65; Wyman *v.* Brown, 50 Me. 160; Warren *v.* Cochran, 30 N. H. 379; Chandler *v.* Brown, 59 N. H. 370.

[6] Putnam Free Sch. *v.* Fisher, 38 Me. 324.

[7] Fla. Sou. Ry. Co. *v.* Loring, 2 U. S. App. 310; s. c. 51 Fed. Rep. 932; Tyler on Eject. 541.

a contrary doctrine prevails in Massachusetts.[1] In the absence of adverse possession, seisin follows the legal title, and seisin in law carries with it the legal possession.[2]

§ 1961. **Disseisor's Estate always a Fee.** — The estate acquired by disseisin is, and must be, with one exception,[3] a fee. The man who has and claims the seisin of lands, not subordinate, but adverse to the rights of all other persons, has thereby the fee, of which he can only be divested by the entry of a claimant with a better right, or by act of the law; and both of these are barred by his being suffered to hold such seisin for the period prescribed by the statute of limitations.[4] And the operation of the statute has been said not only to bar any remedy by the disseisee, but to extinguish his title,[5] forming a new title as strong as one obtained by grant.[6] But whether the estate which two joint-disseisors gain by their possession is that of joint-tenants, or tenants in common, does not seem to be well settled.[7]

§ 1962. **Requisites of Possession to give Title.** — "The nature of that adverse possession which is required to constitute a bar to the assertion of a legal title by the owner of it, or by one against whom the adverse occupant brings ejectment," "must be an *actual*, *visible*, *notorious*, *distinct*, and *hostile* possession."[8] The party must claim the land as his own openly and exclusively.[9]

§ 1963. **Possession must be actual.** — There must be actual

[1] Farwell *v.* Rogers, 99 Mass. 33.

[2] Ibid.

[3] The exception is in case of the disseisin of the tenant of a particular estate. See *post*, § 1679.

[4] 2 Prest. Abst. 293; Co. Lit. 271 *a*; Ang Lim. (2d ed.) 396; M'Call *v.* Neely, 3 Watts, 71; Wheeler *v.* Bates, 21 N. H. 460.

[5] Bicknell *v.* Comstock, 113 U. S. 149.

[6] Sherman *v.* Kane, 86 N. Y. 57.

[7] Fowler *v.* Thayer, 4 Cush. 111.

[8] Hawk *v.* Senseman, 6 Serg. & R. 21, by Duncan, J.; 2 Smith, Lead. Cas. (5th Am. ed.) 560, 561; Calhoun *v.* Cook, 9 Penn. St. 226; Melvin *v.* Proprs. Locks and Canals, 5 Met. 15, 33; Turney *v.* Chamberlain, 15 Ill. 271; Armstrong *v.* Risteau, 5 Md. 256; Ang. Lim. (2d ed.) 410, 412, 416; 2 Greenl. Ev. § 557; Robinson *v.* Lake, 14 Iowa, 424; Cahill *v.* Palmer, 45 N. Y. 484; Booth *v.* Small, 25 Iowa, 177; Partch *v.* Spooner, 57 Vt. 583; Sparrow *v.* Hovey, 44 Mich. 63.

[9] Jackson *v.* Berner, 48 Ill. 208; Watson *v.* Jeffrey, 39 N. J. Eq. 62.

occupancy, clear, definite, positive, and notorious.[1] Actual residence upon or enclosure of land is not always requisite to constitute such possession. Acts done under a claim of right equivalent to actual possession, if they are open, notorious, and hostile, may be sufficient.[2] If one occupies another's land by a permanent structure, it is a disseisin of the owner, though done under a mistake; nor could the tenant, if sued by the owner, plead non-tenure or disclaimer to the suit. And if a railroad take land by eminent domain for the uses of the road, and then occupy it for purposes outside of the uses of the road, as by leasing it to tenants for shops or stores, it would be a disseisin of the land-owner, and render them liable to an action for disseisin and for mesne profits, though it would not deprive the road of the use of the premises for purposes pertaining to the exercise of their corporate franchises.[3] The placing and maintaining of a fish-house or an engine-house on another's land by a city was held to be a disseisin of the owner to the extent of such occupancy.[4]

§ 1964. **What Acts do not amount to Possession.** — [Therefore, the following acts could not furnish evidence of the possession of land: Passing over land lying open and unenclosed;[5] taking a deed;[6] giving a warranty deed;[7] occupation without intent to claim ownership;[8] payment of taxes, surveying and mapping the land, and executing a mortgage covering it,[9] although these would be evidence of the intent to characterize a possession otherwise shown;[10] entering upon

[1] Cook *v.* Babcock, 11 Cush. 210; Little *v.* Downing, 37 N. H. 367; John Henry Shoe Co. *v.* Williamson, 64 Ark. 100; s. c. 40 S. W. Rep. 703; Parkersburg Ind. Co. *v.* Schultz, 43 W. Va. 470; s. c. 27 S. E. Rep. 255.

[2] Booth *v.* Small, 25 Iowa, 177; Whalley *v.* Small, 29 Iowa, 289.

[3] Proprietors, etc. *v.* Nashua & L. R. R. Co., 104 Mass. 1, 12.

[4] Boston *v.* Richardson, 105 Mass. 372.

[5] Gittings *v.* Moale, 21 Md. 148.

[6] Robinson *v.* Lake, 14 Iowa, 424.

[7] Fla. Sou. Ry. Co. *v.* Loring, 2 U. S. App. 310; s. c. 51 Fed. Rep. 932; Tyler on Eject. 541. Otherwise in Massachusetts. Farwell *v.* Rogers, 99 Mass. 33.

[8] Society for Propag. Gosp., etc. *v.* Pawlet, 4 Pet. 507; Ewing *v.* Burnet, 11 Pet. 41; Ang. Lim. (2d ed.) 401, 413; La Frombois *v.* Jackson d. Smith, 8 Cow. 609, 613, 617; Ford *v.* Wilson, 35 Miss. 504; Magee *v.* Magee, 37 Miss. 138.

[9] Seymore *v.* Cresswell, 18 Fla. 29; Worthley *v.* Burbanks, 146 Ind. 534; s. c. 45 N. E. Rep. 779.

[10] Webb *v.* Richardson, 42 Vt. 465; Wren *v.* Parker, 57 Conn. 529; s. c. 18 Atl. Rep. 790; Frick *v.* Sisson, 75 Cal. 337; s. c. 17 Pac. Rep. 439.

land and cutting a load or two of thatch there every year for twenty years;[1] surveying the land, marking the lines, and occasionally cutting the grass on a part.[2]] Nor would an entry under a deed of wild land from one who has no title, though it were formally executed and recorded, have this effect, unless followed by a visible occupancy or exclusive possession, manifested by fences or otherwise.[3] So entering occasionally upon land adjoining that of another, and making sugar in a camp built thereon, and this continued for more than twenty years, is not such a possession as the statute contemplates.[4] So where one had a lot of land unenclosed, lying adjoining a stream, and another used it for laying a lot of old wheels and loose stones upon it, crossing it from time to time, but not enclosing it, it was held not to be a disseisin of the true owner, nor an adverse possession of the land, it being done without first receiving any deed of the premises.[5] And a case illustrative of what is required to make a possession *exclusive*, within the meaning of the law, was where a fisherman took possession of an island which had formed in a navigable river, and occupied it for a sufficient length of time to acquire a title to it, if his possession had been exclusive; but as it was shown that it was used by any one, who had occasion to go upon it for fishing, as public property, it did not give him any title to the same.[6] And an enclosure of land, to be sufficient to answer this purpose, must be a substantial enclosure, and with an actual occupancy, definite, positive, and notorious. Nor would the making of what is called a "lop" or "slash" fence around a parcel of woodland answer this purpose, unless actual notice to the owner is proved.[7] Where, therefore, one

[1] Wheeler *v.* Spinola, 54 N. Y. 387; Roberts *v.* Baumgarten, 51 N. Y. Super. Ct. 482; Parker *v.* Wallis, 60 Md. 15; Townsend *v.* Reeves, 44 N. J. L. 525; Harms *v.* Kransz, 167 Ill. 421; s. c. 47 N. E. Rep. 746.

[2] Kennebec Purchase *v.* Springer, 4 Mass. 416; Smith *v.* Burtis, 6 Johns. 218; Slice *v.* Derrick, 2 Rich. 627; O'Hara *v.* Richardson, 46 Penn. St. 391; Oatman *v.* Fowler, 43 Vt. 465.

[3] Bates *v.* Norcross, 14 Pick. 224; Lane *v.* Gould, 10 Barb. 254.

[4] Smith *v.* Mitchel, 1 A. K. Marsh. 207.

[5] Corning *v.* Troy Iron, etc. Factory, 44 N. Y. 588, 596.

[6] Tracy *v.* Norwich & Wor. R. R., 39 Conn. 382.

[7] Coburn *v.* Hollis, 3 Met. 125; Jackson d. Hardenberg *v.* Schoonmaker, 2 Johns. 230; Den d. Saxton *v.* Hunt, 20 N. J. L. 487; Hale *v.* Glidden, 10

claimed a parcel of woodland by disseisin against another, in whom was the record-title, and, to establish his claim, showed that he entered and cut for use and sale the wood and timber growing upon it, at one time cutting it all off; that he, moreover, cleared a small part for cultivation, and ran a line between this and the other party's other land, *lopping* trees along the line to mark it; all of which was known to the other party; but the land in question was never enclosed by fences, nor built upon, nor cultivated, — it was held, that all this did not constitute an actual seisin, as these were not, in their nature, acts of exclusive possession.[1]

§ 1965. **What Acts amount to Possession.** — And yet it is not, as a universal proposition, necessary to prove an actual residence or an actual enclosure. The erection of a fence, for instance, is nothing more than an act presumptive of an intention to assert an ownership and possession over the property. Other acts may be equally evincive of such an intention;[2] and there need not be a fence, building, or other improvement, made to constitute an adverse possession. Where acts of ownership have been done upon land, which, from their nature, indicate a notorious claim of property in it, within the knowledge of an adverse claimant, and without interruption or an adverse entry by him, it will be sufficient. Thus, where the owner of a parcel of wild land sold a certain number of acres to be taken from one side of the lot, and the parties went on and fixed the line of division, but made no fence, and each occupied up to that line for twenty years, it was held to give the purchaser a good title by possession, although it was afterwards found that the line was fixed too far distant from the side-line of the lot.[3] And neither actual occupation, cultivation, nor residence is necessary, when the property is so situated as not to admit of any permanent,

N. H. 397; Smith *v.* Hosmer, 7 N. H. 436; Hutton *v.* Schumaker, 21 Cal. 453; Borel *v.* Rollins, 30 Cal. 415–417.

[1] Slater *v.* Jepherson, 6 Cush. 129; Stevens *v.* Hollister, 18 Vt. 294; Parker *v.* Parker, 1 Allen, 245; Stevens *v.* Taft, 11 Gray, 35; Morris *v.* Callanan, 105 Mass. 133; Morrison *v.* Chapin, 97 Mass. 76; Coburn *v.* Hollis, 3 Met. 128; Young *v.* Herdic, 55 Penn. St. 172.

[2] Ellicott *v.* Pearl, 10 Pet. 412; Langworthy *v.* Myers, 4 Iowa, 18.

[3] Faught *v.* Holway, 50 Me. 24.

useful improvement, and the continued claim of the party has been evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim.[1] Thus, it is said, "much depends upon the nature and situation of the property, and the uses to which it can be applied, or to which the owner or claimant may choose to apply it." "To constitute an adverse possession, it is only necessary that it should have been under a claim or color of title." "The possession will be adverse if had and continued under the claim or color of title, however groundless the supposed title may prove to be."[2]

§ 1966. **Acts of Possession, continued.** — But there are some acts which are of such a notorious character as of themselves to constitute a disseisin, without any necessity of showing that they were known to the real owner of the land, such as building a fence around the land, or erecting buildings upon it.[3] And one, by maintaining a fence within a highway under a claim of right for forty years, will gain for the occupant a prescriptive right against the Commonwealth.[4] If one tenant in common erect a building upon the common land for his own use, it is an ouster to that extent of his co-tenants; and they may have trespass against him for so doing, or may remove the buildings.[5]

§ 1967. **Disseisin limited by Actual Possession.** — If the disseisin be merely by the erection of buildings, it would not, it seems, extend beyond the part of the land actually occupied by them, as where one built a blacksmith's and carpenter's shop upon another's land, and the occupants of the latter shop occasionally made use of the adjoining land to dry boards

[1] Ewing *v.* Burnet, 11 Pet. 41. See Blood *v.* Wood, 1 Met. 528, 535; Den d. Saxton *v.* Hunt, 20 N. J. L. 487; Bailey *v.* Carleton, 12 N. H. 9; Ang. Lim. (2d ed.) 415, 416; La Frombois *v.* Jackson d. Smith, 8 Cow. 604; Royall *v.* Lisle, 15 Ga. 545.

[2] Ford *v.* Wilson, 35 Miss. 504, 505; Grant *v.* Fowler, 39 N. H. 104; Farrar *v.* Fessenden, 39 N. H. 281; Close *v.* Samm, 27 Iowa, 503; *post*, § 1982.

[3] Poignard *v.* Smith, 6 Pick. 172, 178; Ang. Lim. (2d ed.) 416, 423; Jackson d. Constantine *v.* Warford, 7 Wend. 62.

[4] Cutter *v.* Cambridge, 6 Allen, 20.

[5] Bennett *v.* Clemence, 6 Allen, 18; Stedman *v.* Smith, 8 El. & Bl. 1; Erwin *v.* Olmsted, 7 Cow. 229.

upon, and those of the blacksmith-shop used other parts of the lot to run carriages on, and to put tires on wheels, it was held that the disseisin extended only to the part covered by the buildings ;[1] and so far as it was a disseisin, it operated against the mortgagee, though done to the possession of the mortgagor. And except where the actual possession is under color of title it is a generally conceded principle, that acts of disseisors are, in respect to the lawful owners or true proprietors, to be limited to an actual ouster and exclusive occupation by such disseisors, and, as many cases say, to what one has under actual improvement and within a substantial enclosure.[2]

§ 1968. **Of Possession by Mistake.** — [The general rule is that possession under a mistake as to the extent of boundaries will not prevent the running of the statute,[3] provided the circumstances are not such as to rebut the intention to claim adversely. The distinction seems to be this: if the limits of the occupation be fixed with the intention of claiming them as *the* boundaries, the statute runs; but if the occupation and delimitation of the boundaries appear to be merely provisional, with the intent to claim them as boundaries if they are found to be the proper boundaries, then the statute does not run.[4]

§ 1969. **Divergent Views.** — But even the foregoing distinction fails to reconcile the cases. It will be found that those authorities which hold that the statute did not run where possession was taken under a mistake, proceed upon the theory

[1] Poignard *v.* Smith, 8 Pick. 272; Boston *v.* Richardson, 105 Mass. 372.

[2] Brimmer *v.* Proprs. Long Whf., 5 Pick. 131, 135; Blood *v.* Wood, 1 Met. 528, 535; Miller *v.* Shaw, 7 Serg. & R. 129; Cresap *v.* Hutson, 9 Gill, 269; Jackson d. Hardenberg *v.* Schoonmaker, 2 Johns. 234; Davidson *v.* Beatty, 3 Harr. & M'H. 594; Brandt *v.* Ogden, 1 Johns. 156; Den d. Saxton *v.* Hunt, 20 N. J. L. 487; Lane *v.* Gould, 10 Barb. 254; Sharp *v.* Brandow, 15 Wend. 597; Jackson *v.* Warford, 7 Wend. 62; Smith *v.* Hosmer, 7 N. H. 436; Watrous *v.* Southworth, 5 Conn. 305; Cluggage *v.* Duncan, 1 Serg. & R. 113; Ang. Lim. (2d ed.) 429; Pipher *v.* Lodge. 16 Serg. & R. 231; Hatch *v.* Vt. Cent. R. R. Co., 28 Vt. 142; Goewey *v.* Urig, 18 Ill. 238; Hanna *v.* Renfro, 32 Miss. 129, 130.

[3] Crary *v.* Goodman, 22 N. Y. 170; Brimmer *v.* Long Whf., 5 Pick. 131; French *v.* Pearce, 8 Conn. 439; Caulfield *v.* Clark, 17 Ore. 473; s. c. 11 Am. St. Rep. 845, and cases cited in note; Omaha & Florence L. & T. Co. *v.* Hansen, 32 Neb. 449; s. c. 49 N. W. Rep. 456.

[4] Howard *v.* Reedy, 29 Ga. 152; Mills *v.* Penny, 74 Iowa, 172; Keen *v.* Schnedler, 92 Mo. 516; East Tenn. Iron & C. Co. *v.* Ferguson (Tenn. Ch.), 35 S. W. Rep. 900.

that proof of the mistake was evidence to negative, *prima facie*, at least, the intent to claim adversely; while those which hold that the statute did run, are based on the theory that the lack of hostile intent must be shown *aliunde*.[1]]

§ 1970. **Possession must be continued.** — As to the necessity that the possession should be *continued*, it seems that it must be kept up during the requisite period prescribed by statute, by actual residence or a continued cultivation or enclosure, if the property is susceptible of a permanent, useful improvement; otherwise, such use and occupation of it as, from its nature, it is susceptible of, will be sufficient, if done with a claim of ownership.[2] And even if the continuity of possession be broken by fraud or wrongful entry, it would defeat the operation of the statute.[3] Though it may have been twenty years since the tenant entered upon the land, if he had been out of possession of it two years in that time, it would not bar the owner's right to recover it.[4] But if one enter upon land, it is not necessary, in order to his retaining continuous possession, for him to remain on the land constantly. It depends somewhat upon the condition of the premises. If he leaves it without an intention to return, his possession is at an end. Whether an offer to buy off a threatened litigation, or to buy up an opposing title, is of itself a break in the adverse possession, is not settled. It *seems* that it may be, with other circumstances;[5] but it has also been held not to be.[6] [Judgment in ejectment, followed by dispossession, under process, interrupts the running of the statute, although the judgment be subsequently reversed and the land restored to the defendant.[7]]

[1] See cases, *supra*.

[2] 2 Smith, Lead. Cas. (5th Am. ed.) 562; Ewing *v.* Burnet, 11 Pet. 41; Brandt *v.* Ogden, 1 Johns. 156; Ang. Lim (2d ed.) 446; Woods *v.* Hull, 90 Tex. 228; s. c. 38 S. W. Rep. 165.

[3] San Francisco *v.* Fulde, 37 Cal. 349; Satterwhite *v.* Rosser, 61 Tex. 166; Bowen *v.* Guild, 130 Mass. 121. But the adverse possession of a beach by a town is not broken by the passage of inhabitants over the beach to get sand or seaweed, or by their using the beach for the temporary deposit of seaweed. New Shoreham *v.* Ball, 14 R. I. 566.

[4] Carlisle *v.* Cooper, 19 N. J. Eq. 259.

[5] Central Pacific R. R. Co. *v.* Mead, 63 Cal. 112; Pacific Mut. L. Ins. Co. *v.* Stroup, id. 150.

[6] Tobey *v.* Secor, 60 Wis. 310; Walbrunn *v.* Ballen, 68 Mo. 164.

[7] Gould *v.* Carr, 33 Fla. 523; s. c. 15 So. Rep. 259.

§ 1971. **Continuity of Possession, continued.** — Every element which goes to make a possession adverse must concur, or it will not confer a title. "And if," in the language of the court of Pennsylvania, "there be one element more distinctly material than another in conferring title, where all requisites are so, it is the existence of a *continuous* adverse possession for twenty-one years." An actual interruption of the possession is fatal to the claim under it.[1] Where, therefore, the tenant so far yielded to the claim of a third party to a right of possession as to let him enter and occupy under an agreement to surrender the possession, if he did not, by such a time, produce the evidence of his right, and, failing to do so, he quit possession, and the first tenant re-entered, it was held to break the requisite continuity of his possession to acquire title thereby. He could not *tack* the two periods together, to make, in the aggregate, the requisite period of adverse possession.[2] The tenant, therefore, must remain permanently on the land, or else occupy it in such a way as to leave no doubt on the mind of the true owner, not only who the adverse claimant is, but that it is his purpose to keep him out of his land. Nor will it be sufficient, that when, leaving the land, the tenant had a secret purpose and intent to return at his convenience, sooner or later, and reoccupy the land.[3] If, therefore, there is any period during the twenty years in which the person having the right of entry could not find an occupant on the land on whom he could bring or sustain his ejectment, technically called "the tenant to the *præcipe*," that period cannot be counted against him as part of the twenty years.[4] But this possession need not be continued by the same person. It will be sufficient that it is held by different persons in succession, holding in privity with each other, or with the one who claims title by such possession.[5]

[1] Groft *v.* Weakland, 34 Penn. St. 308.

[2] Austin *v.* Bailey, 37 Vt. 224.

[3] Denham *v.* Holeman, 26 Ga. 191. See Morrison *v.* Kelly, 22 Ill. 623; Nixon *v.* Porter, 38 Miss. 415.

[4] Trotter *v.* Cassady, 3 A. K. Marsh. 366.

[5] Wheeler *v.* Moody, 9 Tex. 377; Schrack *v.* Zubler, 34 Penn. St. 38; Doswell *v.* De La Lanza, 20 How. 32; Cooper *v.* Smith, 9 Serg. & R. 33. How far husband is held to be in privity with wife in possession of lands, see Doe d. Parker *v.*

§ 1972. **Presumption of Continuity.** — If a seisin, moreover, is admitted as proved to be in any one at any given time, the law presumes it to continue till negatived by evidence by him who alleges a disseisin.[1]

§ 1973. **Successive Possessions — Tacking.** — In the case of successive holders of land after a disseisin committed by the first of them, the seisin thereby acquired by him will not enure to the benefit of the others who come into possession after him, unless there is a privity of estate between them and him by purchase or descent. Their consecutive possessions cannot, in the language of the law, be tacked together to make a continuity of disseisin. And this applies in the case of the wife of a disseisor holding after his decease, as, unless she claims as his devisee, she does not come in with the requisite privity, such as exists between ancestor and heir, grantor and grantee, or devisor and devisee.[2] But a surviving husband, entering upon his estate of curtesy, may tack his possession upon that of his deceased wife.[3] A disseisor cannot add the possession of his predecessor to his own, unless he enters under and through him by privity of estate.[4] Therefore, where A,

Gregory, 2 Ad. & E. 14; Doe d. Tranter *v.* Wing, 6 Car. & P. 538; Doe d. Pritchard *v.* Jauncey, 8 Car. & P. 99; Holton *v.* Whitney, 30 Vt. 405; Johnson *v.* Nash, 15 Tex. 419; Menkens *v.* Blumenthal, 27 Mo. 198; Clark *v.* Chase, 5 Sneed, 636. This may be done by statute in California. Franklin *v.* Dorland, 28 Cal. 180.

[1] Brown *v.* King, 5 Met. 173; Brimmer *v.* Long Whf., 5 Pick. 135; Fosgate *v.* Herkimer Mg. & H. Co., 9 Barb. 287; Currier *v.* Gale, 9 Allen, 525.

[2] Sawyer *v.* Kendall, 10 Cush. 241, 244; Malloy *v.* Bruden, 86 N. C. 251; Musham *v.* Musham, 87 Ill. 80; Armstrong *v.* Risteau, 5 Md. 256; Melvin *v.* Proprs. Locks and Canals, 5 Met. 15, 32; Wade *v.* Lindsey, 6 Met. 407, 412; 2 Smith, Lead. Cas. (5th Am. ed.) 265; Overfield *v.* Christie, 7 Serg. & R. 173; Ang. Lim. (2d ed.) 447; Alexander *v.* Pendleton, 8 Cranch, 462; Chilton *v.* Wilson, 9 Humph. 399; Doe d. Harlan *v.* Brown, 4 Ind. 143; Johnson *v.* Nash, 15 Tex. 419, 422; Jackson d. Baldwin *v.* Leonard, 9 Cow. 653; Doe d. Clinton *v.* Campbell, 10 Johns. 477; Doe d. Carter *v.* Barnard, 13 Q. B. 945; Ward *v.* Bartholomew, 6 Pick. 415; Schrack *v.* Zubler, 34 Penn. St. 38; Cochrane *v.* Faris, 18 Tex. 850; Marr *v.* Gilliam, 1 Coldw. 488; Carter *v.* Chevalier, 108 Ala. 563; s. c. 19 So. Rep. 798; Clark *v.* Bundy, 29 Oreg. 190; s. c. 44 Pac. Rep. 482. But in South Carolina there can be no lacking. Burnett *v.* Crawford, 50 S. C. 161; s. c. 27 S. E. Rep. 645.

[3] Colgan *v.* Bellings (N. J.), 3 Eastern Rep. 885.

[4] San Francisco *v.* Fulde, 37 Cal. 349; Austin *v.* Rutland R. R. Co., 45 Vt. 215; Brownson *v.* Scanlan, 59 Tex. 222; Cook *v.* Dennis, 61 Tex. 246; Hines *v.* Rutherford, 67 Ga. 606.

who was in possession under color of title, gave an estate for life by will to one, and a remainder to another in fee, and the tenant for life entered and held possession during life, and was followed by the remainder-man, the latter could not tack the possession of the tenant for life upon his own, as he took from the devisor, and not from the tenant for life. And the same doctrine was applied to acquiring an easement of way by user by several successive owners of the dominant estate.[1] But the possession of successive tenants under the same landlord is continuous.[2] In a subsequent case, the court extended the doctrine of successive owners tacking their consecutive possessions to gain a title by limitation to a purchaser who held under the executor of an insolvent who was the first disseisor, and had devised the estate to one who held it for a time until sold for the payment of testator's debts. The purchaser held directly from the disseisor, and his devisee gained no rights as against his creditors.[3] And in another case it was held sufficient to continue the original disseisin and possession, that the second occupant came in under the first, and continued to hold, although there was no deed from the first to the second creating a privity of estate between them. It would be sufficient if done under a contract by which the second was to have possession.[4] In Tennessee, it is not necessary to show even a parol agreement between successive occupants. It is enough that the owner has been kept out of possession the requisite period of time, if there has been a continuous possession by successive occupants; and the same is the law in North Carolina.[5] So where a husband entered, in right of his wife, upon land to which she had no title but by possession,

[1] Leonard *v.* Leonard, 7 Allen, 277.

[2] Thompson *v.* Kauffelt (Penn.), 2 Eastern Rep. 390. Where a testator, who was a disseisor, devised to A for life, remainder to B in fee, it was held the possession of testator. A and B might be tacked as in succession to make title in B by adverse possession. Haynes *v.* Boardman, 119 Mass. 414. The paying rent to original owner by tenant of disseisor does not affect the disseisor's right, if not known to him. Ibid.

[3] Peele *v.* Cheever, 8 Allen, 89; Rambert *v.* Edmondson, 99 Tenn. 15; s. c. 41 S. W. Rep. 935.

[4] Smith *v.* Chapin, 31 Conn. 530.

[5] Scales *v.* Cockrill, 3 Head, 435; Candler *v.* Lunsford, 4 Dev. & B. (N. C.) 409.

and, after her death, continued to hold possession of the premises for a period long enough, if added to that during which he had held it during his wife's life, to make the requisite term of limitation, it was held that he could not tack these together, so as thereby to acquire a title.[1] But where a husband entered upon land claiming it as belonging to his wife, and, after his death, she continued to occupy till the two periods amounted to the term of limitation, it was held to be a sufficient adverse possession to gain for her a title thereby.[2] So where a married woman, under a contract of purchase, entered upon and occupied land uninterruptedly and exclusively for more than twenty years, it was held that she thereby acquired a title to the same; and, in an action by the heirs of the original owner against the husband to recover the land, it was held that he might defend against the same under the title of his wife, although he had, during her occupancy, but without her knowledge, made a deed of release of the premises to the original owner, the latter never having availed himself of such release.[3] So where the husband and wife entered upon land by virtue of a parol gift to the wife, and occupied the estate during the term of limitation, the husband doing nothing inconsistent with a sole ownership by the wife, it was held that she acquired a title thereby to the premises.[4] Where a husband, in possession of land adversely to the true owner, died, leaving it to his widow and heirs, and she married again, and the claimant sued the husband and obtained judgment for the land, but did not make her or the first husband's heirs parties to the suit, it was held not to affect their rights, and, by continuing the possession, they acquired a title by limitation.[5] But, in some of the States, the right of the purchaser under a disseisor to tack his grantor's possession to his own is denied.[6]

§ 1974. **Possession must be visible, notorious, distinct, and definite** in character, and to give it these requisites the ouster

[1] Doe d. Tranter *v.* Wing, 6 Car. & P. 538. See Doe d. Pritchard *v.* Jauncey, 8 Car. & P. 99.

[2] Holton *v.* Whitney, 30 Vt. 405.

[3] Steel *v.* Johnson, 4 Allen, 425; Outcalt *v.* Ludlow, 32 N. J. 239.

[4] Clark *v.* Gilbert, 39 Conn. 94.

[5] Hamilton *v.* Wright, 30 Iowa, 480.

[6] 2 Smith, Lead. Cas. (5th Am. ed.) 563; King *v.* Smith, Rice, 10.

must be of such notoriety that the owner may be presumed to have notice of it and of its extent.[1] But if the possession be openly and notoriously held by a party, it may avail as a disseisin of the true owner, although it be not shown that actual notice of its being under an adverse claim was given to the owner.[2]

§ 1975. **Possession must be hostile or adverse.** — This requisite is partly a question of fact, and partly one of law. Whether the possession in fact is adverse, or is under the owner's title, is one for the jury,[3] with this limitation, that the burden of showing the possession to have been adverse is upon the party alleging it;[4] but when such possession is once proved, it is presumed to continue until some change is proved.[5] One may show as a fact, in order to prove that his possession is adverse to all persons, that, while in possession, he sued one in trespass who had entered upon him and prosecuted the action to final judgment, although such defendant was no party to the suit in which the evidence was offered.[6] But what constitutes an adverse possession, and what evidence of its being such is sufficient, are questions of law for the court.[7] As the possession derives its character from the intent with which it was taken and is held, it is competent to show by the declarations of the occupant, made during the occupancy, that he did not hold adversely.[8]

[1] 2 Smith, Lead. Cas. (5th Am. ed.) 563, 564; Hodgkinson *v.* Fletcher, 3 Doug. 31; Cook *v.* Babcock, 11 Cush. 210; Doe d. Clinton *v.* Campbell, 10 Johns. 477; Denham *v.* Holeman, 26 Ga. 191; Pray *v.* Pierce, 7 Mass. 383; Doolittle *v.* Tice, 41 Barb. 181; Close *v.* Samm, 27 Iowa, 503; Grube *v.* Wells, 34 Iowa, 152; Parkersburg Ind. Co. *v.* Schultz, 43 W. Va. 470; s. c. 27 S. E. Rep. 255.

[2] Samuels *v.* Borrowscale, 104 Mass. 207.

[3] Bunce *v.* Bidwell, 43 Mich. 542.

[4] Alexander *v.* Wheeler, 69 Ala. 332.

[5] Clements *v.* Lampkin, 34 Ark. 598.

[6] Hollister *v.* Young, 42 Vt. 403.

[7] Yelverton *v.* Steele, 40 Mich. 538.

[8] 2 Smith, Lead Cas. (5th Am. ed.) 566, 567; Sailor *v.* Hertzogg, 2 Penn. St. 182; Ang. Lim. (2d ed.) 413. See Beverly *v.* Burke, 9 Ga. 447, that the question of adverse seisin is exclusively for the jury. Ricard *v.* Williams, 7 Wheat. 59, 112; Church d. Burghardt, 8 Pick. 327. How far it is a question of law, and how far of fact, see Bradstreet *v.* Huntington, 5 Pet. 438; Magee *v.* Magee, 37 Miss. 154; Doe *v.* Roffey *v.* Harbrough, 1 Nev. & M. 422; Doe d. Pritchard *v.* Jauncey, 8 Car. & P. 99; Hale *v.* Silloway, 1 Allen, 21; Tappan *v.* Burnham, 8 Allen, 70; McNamee *v.* Moreland, 26 Iowa, 109.

§ 1976. **What Possession deemed adverse.** — Thus, where the line between two adjacent owners is in dispute, and they agree that the fence between them is not the true line, and that that shall be ascertained, an occupancy in reference to such a fence will not be adverse on either side: it is deemed to be by mutual consent. But if a fence is placed upon what is assumed to be the true line, and the parties occupy up to it, it will gain a title, if continued for twenty years, although after that time it is discovered not to be on the proper line.[1] But though the occupancy may be explained, so as to do away with the effect otherwise to be ascribed to it, it must be done by the party seeking to disturb the effect of the twenty years' possession.[2] Where, therefore, one enters in subserviency to the title of the real owner, there must be a clear, positive, and continued disclaimer and disavowal of the title under which he entered, and an assertion of an adverse right brought home to the owner, in order to lay a foundation for the operation of the statute of limitations.[3] Where the husband entered in the right of his wife, who was tenant for life, and continued to hold the premises after her death for more than twenty years, it was held that his possession was adverse to the owner after her death, and consequently operated as a statute bar to his claim.[4] Where, by mistake, a deed described different premises from those which it was intended to convey, it was held that the fact that the grantee had entered upon the land supposing it to have been conveyed by the deed did not destroy the adverse character of his subsequent possession so as to prevent him from acquiring title by adverse possession.[5] [If one enter wishing to purchase, not knowing who the owner is, but not claiming the premises as his own, the possession is

[1] Burnell *v.* Maloney, 39 Vt. 583; Grim *v.* Murphy, 110 Ill. 271; *contra*, Houx *v.* Batteen, 68 Mo. 84. Cf. Tobey *v.* Secor, 60 Wis. 310; Donahue *v.* Thompson, id. 500; Alexander *v.* Wheeler, 69 Ala. 332.

[2] Doe d. Draper *v.* Lawley, per Denman, C. J., 13 Q. B. 954.

[3] Hall *v.* Stevens, 9 Met. 418; Day *v.* Cochran, 24 Miss. 261; Clarke *v.* McClure, 10 Gratt. 305; Floyd *v.* Mintsey, 7 Rich. 181; Criswell *v.* Altemus, 7 Watts, 581; Long *v.* Mast, 11 Penn. St. 189; Harrison *v.* Pool, 16 Ala. 167; Ang. Lim. (2d ed.) 401.

[4] Doe d. Parker *v.* Gregory, 2 Ad. & E. 14.

[5] Bean *v.* Bachelder, 74 Me. 202; Ricker *v.* Hibbard, 73 Me. 105. See *ante*, § 1968.

not adverse.[1] So of the possession of a vendee under a bond for title, until breach of the bond;[2] but otherwise after the breach, if the vendee repudiates the vendor's title.[3] Possession under an executed contract to purchase is adverse.[4] Neither the mortgagor nor his grantee holds adversely to the mortgagee until he has distinctly disclaimed holding under him and asserted title in himself;[5] and so of a tenant as to his landlord;[6] but there is no such relation between tenant for life and remainder-man, and the grantee of the former may hold adversely to the latter,[7] after the death of the tenant for life.[8] One who enters under a parol gift holds adversely to the donor;[9] and so of possession under a void grant.[10]]

§ 1977. **Disseisin by Co-tenant.** — As the possession of one of several tenants in common, so far as it is exclusive, is always deemed to be subordinate to the rights of his co-tenants, and to be held for their benefit, he must, if he seeks to give to it the character of a disseisin, show what is tantamount to an actual ouster of such co-tenants; as, for instance, an appropriation of the profits, under a claim of exclusive right, or with a palpable intent to possess the whole exclusively.[11] Merely taking a deed by one of two co-tenants from a stranger of the entire estate, and putting the same on record, is

[1] Long *v.* Young, 28 Ga. 130.

[2] Ormond *v.* Martin, 37 Ala. 604.

[3] Spratt *v.* Livingston, 32 Fla. 507; s. c. 14 So. Rep. 160.

[4] La Frambois *v.* Jackson, 8 Cow. 589; Hart *v.* Bostwick, 14 Fla. 162; Clouse *v.* Elliott, 71 Ind. 302; Moring *v.* Ables, 62 Miss. 263; Walker *v.* Crawford, 70 Ala. 567; Hines *v.* Rutherford, 67 Ga. 606.

[5] Whittington *v.* Flint, 43 Ark. 504; Elsberry *v.* Boykin, 65 Ala. 336.

[6] Potts *v.* Coleman, 67 Ala. 221; Ehrman *v.* Mayer, 57 Md. 612.

[7] Christie *v.* Gage, 71 N. Y. 189.

[8] See *post*, § 1979.

[9] Graham *v.* Craig, 81 Penn. St. 465; Melvin *v.* Proprs. Locks and Canals, 5 Met. 15; Comins *v.* Comins, 21 Conn. 413.

[10] Cases, *supra;* Jackson d. Vanderlyn *v.* Newton, 18 Johns. 355; Blair *v.* Smith, 16 Mo. 273; Sumner *v.* Stevens, 6 Met. 337; Ashley *v.* Ashley, 4 Gray, 197.

[11] 2 Smith, Lead. Cas. (5th Am. ed.) 567; Challefoux *v.* Ducharme, 8 Wis. 287; Zeller *v.* Eckert, 4 How. 295; M'Clung *v.* Ross, 5 Wheat. 124; Alexander *v.* Kennedy, 19 Tex. 488; Bennet *v.* Bullock, 35 Penn. St. 364; Owen *v.* Morton, 24 Cal. 376; Peters *v.* Jones, 35 Iowa, 512; Weshgyl *v.* Shick, 113 Mich. 22; s. c. 71 N. W. Rep. 323.

not an ouster of his co-tenant, nor a notice of a claim to exclusive and adverse possession. Nor would a deed by one co-tenant of the entire estate to a stranger be a notice to his co-tenant, of an adverse claim of ownership which would work an ouster of his seisin ;[1] but if the stranger enters, puts his deed on record, and holds exclusive possession for twenty years, he acquires title by adverse possession.[2] A sole pernancy of profits by one co-tenant, continued for a long series of years, where there has been no claim of right to such exclusive enjoyment, is evidence upon which a jury is to determine whether it was done with the intent to exclude his co-tenant, its effect depending upon such finding.[3] But, for one co-tenant to oust another, he must do such acts as would be an ouster of a landlord by a tenant, or of any one to whom he stood in a fiduciary relation.[4]

§ 1978. **Warranty of Disseising Grantor.** — The prevailing doctrine in the United States seems to be, that one who is in possession of lands may convey them by deed, such possession giving him, for the purpose of conveyance, a sufficient seisin, which will consequently carry with it a covenant of warranty such as the grantor may enter into in the deed of conveyance ; and this may be availed of by the assignee of the grantee to whom the land may be conveyed, even though the possession by such grantor was not sufficient to work an actual disseisin of the real owner of the estate.[5] So one in possession may have a writ of entry against one who disturbs him in this possession, although the demandant could not himself defend against a third party in whom was the freehold.[6]

§ 1979. **Disseisin of Particular Tenant.** — No disseisin of the tenant of a particular estate, and occupation under it, however long continued, will affect the right of the reversioner. And the doctrine may be laid down as universal, that no posses-

[1] Holley *v.* Hawley, 39 Vt. 531.

[2] Foulke *v.* Bond, 41 N. J. L. 527 ; Ricker *v.* Butler, 45 Minn. 545 ; s. c. 48 N. W. Rep. 407.

[3] Lefavour *v.* Homan, 3 Allen, 355.

[4] Holley *v.* Hawley, 39 Vt. 534 ; Roberts *v.* Morgan, 30 Vt. 319 ; Gage *v.* Downey, 94 Cal. 241 ; s. c. 29 Pac. Rep. 635.

[5] Slater *v.* Rawson, 6 Met. 439. See Overfield *v.* Christie, 7 Serg. & R. 173.

[6] Currier *v.* Gale, 9 Allen, 525 ; Hubbard *v.* Little, 9 Cush. 475.

sion can be held to be adverse as to one who has no right of entry and possession during its continuance.[1] The latter may enter whenever the particular estate shall determine by its limitation.[2] The statute does not run against a reversioner till the death of the tenant for life, where the latter has conveyed the estate in fee.[3] And where a husband and wife were disseised, and the disseisor held adverse possession for the period of limitation, which possession would bar the right of the husband, if living, at his death she or her representatives might claim the land.[4] But this does not apply to the case of a disseisin done to a mortgagor, as to its affecting the mortgagee.[5]

§ 1980. **Possession under Color of Title.** — [While, as we have seen, a claim of the title founded on mere actual possession will prevail no further than the actual possession extended, it is generally, but not universally, conceded, that an actual adverse possession of a part of a single tract, under color of title by a written instrument which purports to convey the land, will be constructively extended to the entire tract described in the instrument.[6] This doctrine, however, is subject to certain limitations which will be noticed later.

§ 1981. **What is Color of Title.** — The purpose of color of

[1] Devyr *v.* Schaeffer, 55 N. Y. 451; Allen *v.* De Groodt, 98 Mo. 150; s. c. 11 S. W. Rep. 159.

[2] Miller *v.* Ewing, 6 Cush. 34; Jackson d. Hardenbergh *v.* Schoonmaker, 4 Johns. 390; Salmons *v.* Davis, 29 Mo. 176; Doe *v.* White, 1 Kerr (N. B.), 627.

[3] Gernet *v.* Lynn, 31 Penn. St. 94; Melvin *v.* Locks and Canals, 16 Pick. 137; s. c. 17 Pick. 255; Raymond *v.* Holden, 2 Cush. 269; Pinckney *v.* Burrage, 31 N. J. L. 21.

[4] Gregg *v.* Tesson, 1 Black, 150.

[5] Poignard *v.* Smith, 8 Pick. 272.

[6] 2 Smith, Lead. Cas. (5th Am. ed.) 563; Hoag *v.* Wallace, 28 N. H. 547; Swift *v.* Gage, 26 Vt. 224; Hoye *v.* Swan, 5 Md. 237; Royall *v.* Lisle, 15 Ga. 545; Turney *v.* Chamberlain, 15 Ill. 271; Green *v.* Liter, 8 Cranch, 250; Ellicott *v.* Pearl, 10 Pet. 412; Spaulding *v.* Warren, 25 Vt. 316; Barr *v.* Gratz, 4 Wheat. 213; Kennebec Purchase *v.* Springer, 4 Mass. 416; Blood *v.* Wood, 1 Met. 528, 535; Lane *v.* Gould, 10 Barb. 254; Noyes *v.* Dyer, 25 Me. 468; Little *v.* Downing, 37 N. H. 367; Farrar *v.* Fessenden, 39 N. H. 279; Sanborn *v.* French, 22 N. H. 249; Jackson d. Vanderlyn *v.* Newton, 18 Johns. 355; Brackett, Petitioner, 53 Me. 228; Wells *v.* Jackson Iron Mg. Co., 48 N. H. 491; Close *v.* Samm, 27 Iowa, 503; Wright *v.* Mattison, 18 How. 50; Smith *v.* Gale, 144 U. S. 509; Swift *v.* Mulkey, 17 Oreg. 532; s. c. 21 Pac. Rep. 871; Cogsbill *v.* Mobile & I. R. R. Co. 92 Ala. 252; s. c. 9 So. Rep. 512; Worthley *v.* Burbanks, 146 Ind. 534; s. c. 45 N. E. Rep. 779.

title is twofold: first, to show that possession of part is taken under claim of title to the whole; second, to define the boundaries of the tract covered by the claim. Therefore, color of title must be a written instrument purporting to convey the land and describing it. It may be void as a conveyance, either because the attempting grantor has nothing to convey,[1] or because it does not meet the statutory requirements of a conveyance. Therefore, the following would afford color of title: A deed void for lack of a seal,[2] the deed of an administrator who acts without power from the court,[3] a deed void for lack of proper witnesses,[4] a tax deed void on its face,[5] a sheriff's deed unaccompanied by the execution,[6] a married woman's deed void by reason of defective acknowledgment,[7] and even a mere assignment indorsed on the back of a deed.[8] And while it has been held that a deed of release or quitclaim of all one's interest in certain land raises no color of title, unless it appear that the releasor had some title to or possession of the premises,[9] this is not the general rule.[10] The instrument, however, must purport to be a present conveyance, as distinguished from an executory promise to convey,[11] or any other evidence of a bargain and sale which does not purport to be itself a conveyance. Thus, a certificate of purchase at tax sale,[12] or an execution, levy, and sale, without the execution of what purports to be a deed,[13] would be insufficient. There is, however, one well-defined exception to the proposition that a deed void on its face may afford color of title; for it is well

[1] Nelson *v.* Davidson, 160 Ill. 254; s. c. 43 N. E. Rep. 361; s. c. 52 Am. St. Rep. 338.

[2] Barger *v.* Hobbs, 67 Ill. 592; Hamilton *v.* Boggess, 63 Mo. 233.

[3] McMullin *v.* Erwin, 58 Ga. 427.

[4] Keech *v.* Enriquez, 28 Fla. 597; s. c. 10 So. Rep. 91.

[5] Lindslay *v.* Fry, 25 Wis. 460; Leffingwell *v.* Warren, 2 Black, 603.

[6] Burkhalter *v.* Edwards, 16 Ga. 593.

[7] Randolph *v.* Casey, 43 W. Va. 289; s. c. 27 S. E. Rep. 231; Irey *v.* Markey, 132 Ind. 546; s. c. 32 N. E. Rep. 309.

[8] Conyers *v.* Kenan, 4 Ga. 308.

[9] Woods *v.* Banks, 14 N. H. 111.

[10] Swift *v.* Mulkey, 17 Oreg. 532; s. c. 21 Pac. Rep. 871; Parker *v.* Newberry, 83 Tex. 428.

[11] Rigor *v.* Frye, 62 Ill. 507; Osterman *v.* Baldwin, 6 Wall. 116. Otherwise in Texas. Elliott *v.* Mitchell, 47 Tex. 445.

[12] Bride *v.* Watt, 23 Ill. 507.

[13] Baird *v.* Evans, 58 Ga. 350.

settled that the instrument must describe the land; so that, if the deed is void for uncertainty of description, it will avail nothing.[1] Many of the cases speak of a "recorded" deed as being color of title. This is misleading. Indeed, if it were true that the instrument required record to afford color of title there would be little left of the rule that a void deed may give color; for a deed defectively executed is not entitled to record. Therefore, it is not necessary that the deed be either acknowledged or recorded.[2] But a bond for title becomes color as soon as its terms have all been complied with except the execution of the deed.[3] A will gives color.[4]

§ 1982. **Exceptions to the Applications of the Rule.** — There are several generally recognized exceptions to the application of the doctrine of adverse possession under color of title: first, the grantee must have taken the attempted conveyance in good faith; second, color of title extends no farther than the land of the true owner of whose land possession is predicated; third, color of title will not extend to two distinct and separated bodies of land; fourth, the *actual* seisin of a true owner is only limited by the bounds of his ownership in one tract, so that adverse possession cannot be predicated of a tract of land, any part of which is in the actual possession of the true owner, any farther than such adverse possession actually extends. And, in addition to these well-recognized exceptions, some courts lay down the rule that where a tract is laid out into distinct lots, "an entry upon and possession of one lot, under a conveyance which embraces several, cannot be extended by construction to other lots not actually occupied."[5] By a reference to the compilation of the statutes at the end of this chapter it will be seen that this rule is established in some States by statute.

[1] Jackson *v.* Woodruff, 1 Cow. 276.

[2] Keech *v.* Enriquez, 28 Fla. 597; s. c. 10 So. Rep. 91; Campbell *v.* McArthur, 2 Hawks, 33; Rawson *v.* Fox, 65 Ill. 200; Minot *v.* Brooks, 16 N. H. 374; Lea *v.* Polk Co. C. Co., 21 How. 493; Cramer *v.* Clow, 81 Iowa, 255; 47 N. W. Rep. 59.

[3] Farley *v.* Smith, 39 Ala. 38; La Frombois *v.* Jackson, 8 Cow. 589.

[4] Trustees of the Univ. *v.* Blount, N. C. T. R. 13. But it has also been held in the same State, without discussion, that a void will would not give color. Callender *v.* Sherman, 5 Ired. L. 711.

[5] Wood, Lim. Act. § 262; Hickman *v.* Link, 97 Mo. 482. *Contra*, Johnson *v.* Simerly, 90 Ga. 612; s. c. 16 S. E. Rep. 951.

§ 1983. **First Exception — Bona Fides of Grantee.** — The grantee must have taken the attempted conveyance in good faith, and not for the mere purpose of giving colorable extent to his actual possession.[1] From this it appears that the grantee must be guilty of actual fraud in order to deprive his deed of its value as color, and that mere constructive fraud will not have this effect. His good faith is presumed.[2] But the rule is otherwise in Wisconsin.[3]

§ 1984. **Second Exception — The Owner disseised.** — There can be no such thing as a constructive disseisin, although an actual disseisin may be constructively extended. Therefore, a conveyance of land cannot raise color of title beyond the confines of the land whose true owner is actually disseised. Thus, if a wrongful grantee of a parcel of land, half of which was owned by A and half by B, were to take possession under his deed of a part of the half owned by A, his constructive possession would extend to the whole of A's half, but B would not be affected.[4]

§ 1985. **Third Exception — Separated Parcels.** — It is well settled that the seisin of one parcel of land acquired by actual occupation cannot be constructively extended to a separated and distinct parcel merely because the two are embraced in one attempted conveyance.[5]

§ 1986. **Fourth Exception — Owner in Actual Possession unaffected.** — The seisin of an owner of an unbroken tract, who is in the actual occupation thereof, cannot be taken from him further than the actual adverse possession extends, consequently, as against the owner in occupation, adverse possession under color of title is of no avail as a foundation of title.[6]

[1] Russell *v.* Mandell, 73 Ill. 136; McMullin *v.* Erwin, 58 Ga. 427; Saxton *v.* Hunt, 20 N. J. L. 487; Wright *v.* Mattison, 18 How. 56; Litchfield *v.* Sewell, 97 Iowa, 247; s. c. 66 N. W. Rep. 104; Gregg *v.* Sayre, 8 Pet. 253, which is the case of a forged deed.

[2] See cases *supra.*

[3] Lampman *v.* Van Alstyne, 94 Wis. 417; s. c. 69 N. W. Rep. 171. And see Sands *v.* Hughes, 53 N. Y. 296.

[4] Bailey *v.* Carleton, 12 N. H. 9; White *v.* Burnley, 20 How. 235; Turner *v.* Moore, 81 Tex. 206.

[5] Wiley *v.* Warmock, 30 Ga. 701; Schultz *v.* Lindell, 30 Mo. 310; Thompson *v.* Burhaus, 61 N. Y. 52; Brown *v.* Boquin, 57 Ark. 97.

[6] Scott *v.* Elkins, 83 N. C. 424; Turner *v.* Moore, 81 Tex. 206; Clarke *v.*

This is true even if the owner go into occupation of a part of his land after the disseisin has commenced. The running of the statute will thereby be stopped as to so much of the land as was constructively possessed and will be restricted to that in actual possession.[1] And there is an obvious corollary to the first proposition: as an owner in occupation cannot be disseised beyond the disseisor's actual possession, and as a disseisor has a good title as against all the world but the true owner; therefore a disseisor under color of title cannot be disseised himself by one not the owner, beyond such second disseisor's actual possession.[2] The foregoing propositions are usually discussed under the head of "mixed possession."

§ 1987. **Tacking Possessions under Color.** — It is not necessary that land held adversely under color of title be held for the statutory period by one person. Provided the "*possessio pedis*" be held continuously by successive persons in privity, the color may pass from one to another by a paper chain of title.[3] But if a hiatus occurs in the paper chain, it is fatal as to so much of the land as is claimed by mere color.[4] But if a disseisor under color of title convey any part of the land wholly uncovered by his actual occupation, the running of the statute is stopped as to the land conveyed; and if he convey the part actually occupied, retaining the unoccupied portion, as to the latter there is no longer any actual possession to support his claim of title, and the running of the statute is stopped, unless he go into actual possession at the time of the conveyance.[5]]

§ 1988. **Equivocal Acts of Disseisin.** — Wherever the act of supposed disseisin is equivocal in its nature, the presumption

Courtney, 5 Pet. 319; Chiles *v.* Jones, 7 Dana (Ky.), 528; Livingston *v.* Peru Iron Co., 9 Wend. 511.

[1] Hunnicut *v.* Peyton, 102 U. S. 333; Hull *v.* Woods, 14 Tex. Civ. App. 590; s. c. 25 S. W. Rep. 458.

[2] Schultz *v.* Arnot, 33 Mo. 172; Hubbard *v.* Barry, 21 Cal. 321; Jackson *v.* Vermilyea, 6 Cow. 677; Wilson *v.* Palmer, 18 Tex. 592. For the application of the propositions of the text to the possible cases arising where there is an interlock between a senior and a junior patent, see Ilsley *v.* Wilson, 42 W. Va. 757; s. c. 26 S. E. Rep. 551.

[3] Cooper *v.* Ord, 60 Mo. 420.

[4] League *v.* Atchison, 6 Wall. 112.

[5] Clark *v.* Courtney, 5 Pet. 354; Chandler *v.* Rushing, 38 Tex. 591.

always is that it is in accordance with, and not in hostility to, the title of the true owner.[1] Such possession is never conclusive: it only raises a presumption of fact, and not a presumption of law. It is only evidence of a grant, subject to be controlled like other presumptions of fact.[2]

§ 1989. **Statute does not run against the State.**— It is, moreover, a principle of universal application, that the statute of limitations, in respect to the possession of lands, does not run against a State,[3] at common law; for a State cannot be disseised except as provided by statute.

§ 1990. **Trusts and Trustees.** — And where a *cestui que trust*, who was entitled to the possession of the estate by the nature of the trust, was suffered to occupy the premises for a long space of time, it was held that the law would either presume a conveyance of the legal estate to him from the trustee, or that he had held by adverse possession.[4] Thus where A bought land with B's money, but took a deed in his own name, and B entered upon and occupied the same for twenty years, it was held to divest A of his legal estate in the premises, although, during that time, he had applied to A to give him a deed, and he had refused to give it.[5] So though, as a general proposition, a *cestui que trust* in possession of land is tenant at will of the trustee, and a sub-letting by a tenant at will does not determine the tenancy without notice to the lessor, yet where the *cestui que trust* entered into an agreement with one C., a stranger, by which the latter took possession of and occupied the premises, until, by sufferance of C., one L. entered and occupied them for the term of more than twenty years, paying

[1] Pipher *v.* Lodge, 16 Serg. & R. 229, 231; Smith *v.* Hosmer, 7 N. H. 436; Smith *v.* Burtis, 6 Johns. 218; Jackson d. Bonnel *v.* Sharp, 9 Johns. 163; Fosgate *v.* Herkimer Mg. & H. Co., 9 Barb. 287; Pierson *v.* Turner, 2 Ind. 123; Alexander *v.* Polk, 39 Miss. 755.

[2] Stevens *v.* Taft, 11 Gray, 36.

[3] Lindsey *v.* Miller, 6 Pet. 666; People *v.* Van Rensselaer, 8 Barb. 189; People *v.* Clarke, 10 Barb. 120; Kingman *v.* Sparrow, 12 Barb. 201; Doe d. Daggett *v.* Durden, 20 Ga. 467; Ward *v.* Bartholomew, 6 Pick. 409; Burgess *v.* Gray, 16 How. 48, 65; Vickery *v.* Benson, 26 Ga. 590.

[4] Kinsman *v.* Loomis, 11 Ohio, 475; Jackson d. Colden *v.* Moore, 13 Johns. 516; Newmarket *v.* Smart, 45 N. H. 87; 4 Am. L. Reg. 390-404, and note by Judge Redfield.

[5] Ripley *v.* Bates, 110 Mass. 162.

no rent therefor, and, at that time, the *cestui que trust* died, it was held, that, by such possession of L., the entry of the trustee was barred, the same having been adverse, and not as a tenant at will.[1] Where one bought lands, but to defraud his creditors caused them to be conveyed to another, it was held that the former might acquire title by adverse possession against the latter.[2]

§ 1991. **Trusts and Trustees, continued.** — Although a trustee may disavow and disclaim his trust, and thereby drive the claimant to an action within the period of limitation, no length of time bars a direct trust between the trustee and *cestui que trust* without an express disavowal of the trust by the trustee.[3] The rule is a settled one, that, so long as the trust subsists, the right of a *cestui que trust* cannot be barred by his being out of possession. This can only be done by barring and excluding the estate of the trustee.[4] There can be no disseisin of a trust.[5] But a *cestui que trust* may disseise his trustee, and gain the legal estate, though his possession will be presumed to be permissive, and not adverse to his trustee.[6] And a stranger, by an adverse possession as against a trustee, continued for the requisite period of time, may bar both the legal estate of the trustee and the equitable interest of the *cestui que trust*.[7]

§ 1992. **Of Disability preventing the running of the Statute.** — In most if not all statutes of limitation, both of England and this country, there are saving clauses in respect to persons under disabilities, such as coverture in women, infancy, lunacy, and the like. But, with few or no exceptions, a disability, to have that effect, must exist at the time when the adverse possession and consequent right of action to recover the land by the true owner begins or accrues. The saving does not extend to any disability subsequently arising.[8] If, therefore, posses-

[1] Melling *v.* Leak, 16 C. B. 652, 670.

[2] Elwell *v.* Hinckley, 138 Mass. 225. *Contra*, Williams *v.* Higgins, 69 Ala. 517.

[3] *Ante*, § 1448; Governor *v.* Woodworth, 63 Ill. 258.

[4] Zeller *v.* Eckert, 4 How. 295; Découche *v.* Savetier, 3 Johns. Ch. 216; Cholmondeley *v.* Clinton, 2 Meriv. 361; Overstreet *v.* Bate, 1 J. J. Marsh. 370.

[5] Dow *v.* Jewell, 18 N. H. 358.

[6] Whiting *v.* Whiting, 4 Gray, 241; Cholmondeley *v.* Clinton, 2 Meriv. 361.

[7] Goss *v.* Singleton, 2 Head, 67, 76.

[8] Mercer *v.* Selden, 1 How. 37; Seawell *v.* Bunch, 6 Jones (N. C.), 197; Clark

sion is taken while the owner is a *feme covert*, an infant, or insane, the statute does not begin to run so long as the disability continues.[1] And where possession was taken during the life of a tenant for life, and the reversioner, then a *feme sole*, married during the life of such tenant, her disability of coverture existing at his death prevented the statute from running against her so long as she remained a *feme covert*.[2] But where the tenant, claiming by adverse possession, entered in the lifetime of the ancestor, who was under no disability, and continued to hold after his death, till the expiration of the twenty years, during a part of which time the heir was under disability, which existed at the time of the descent of the estate, it was held that he was thereby barred.[3] So where the disseisin took place in 1834, and the disseisee became insane in 1843, and continued so the remainder of the twenty years, he was held to be barred.[4] And where the demandant, who was a *feme sole* when the tenant took possession, soon after married, and remained a *feme covert* during the twenty years, her right was barred by the statute.[5] In Georgia, however, if a disability occurs on the part of the owner during the term of limitation, it suspends the operation of the statute while the disability continues.[6]

§ 1993. **Inter Arma silent Leges.** — "When the courts of justice are open, and judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, says Lord Coke, it is said to be a time of peace; but where, by invasion, insurrection, rebellion, or such like,

v. Trail, 1 Met. (Ky.) 40, 41; Haynes *v.* Jones, 2 Head, 372; Cotterell *v.* Dutton, 4 Taunt. 826, 830; Tracy *v.* Atherton, 36 Vt. 503, 510; McFarland *v.* Stone, 17 Vt. 174; Reimer *v.* Stuber, 20 Penn. St. 458.

[1] Gage *v.* Smith, 27 Conn. 74; Seawell *v.* Bunch, *supra*; Little *v.* Downing, 37 N. H. 355; Edson *v.* Munsell, 10 Allen, 557; Peters *v.* Jones, 35 Iowa, 512.

[2] McLane *v.* Moore, 6 Jones (N. C.), 520.

[3] Becker *v.* Van Valkenburgh, 29 Barb. 324; Fleming *v.* Griswold, 3 Hill (N. Y.), 85. See Lincoln *v.* Purcell, 2 Head, 143. See, as to the effect upon prescription as to easements, etc., of descent of the servient estate to a minor heir before the requisite period of adverse enjoyment, *ante*, § 1255.

[4] Allis *v.* Moore, 2 Allen, 306.

[5] Currier *v.* Gale, 3 Allen, 328; Thorp *v.* Raymond, 16 How. 247. See also Ang. Lim. (4th ed.) §§ 477–480.

[6] Everett *v.* Whitfield, 27 Ga. 159. See, as to incorporeal hereditaments in similar cases, Washburn, Easements, 110, 114; *ante*, § 1255.

the peaceable course of justice is disturbed and stopped, so as the courts of justice be, as it were, shut up, *et silent leges inter arma*, then it is said to be time of war." "If a man is disseised in time of peace, and the descent is cast in time of war, this shall not take away the entry of the disseisee." It was accordingly held, that the time during which the courts in the rebellious States were closed to citizens of the loyal States was to be excluded from the computation of time fixed by the statutes of limitation.[1]

§ 1994. **The Perfected Title of the Disseisor.** — [The statute having run in favor of the disseisor, it is not merely that the remedy of the disseisee is barred; but that the title of the disseisee has been taken from him and vested in the disseisor as effectually as it could have been done by deed.[2] The new owner has a perfect title, and if the former owner could now make out a *prima facie* case of ownership, the new owner could maintain against him a bill to quiet title.[3] And a subsequent repeal of the statute could not be given a retroactive effect so as to divest this title.[4]]

NOTE.

In *Alabama*, actions for the recovery of lands, tenements, or hereditaments, or the possession thereof, must be commenced within ten years after the cause of action accrues. Such action may be brought by the State within twenty years. When a right of entry on land accrues, the entry must be considered as having been made, and the cause of action as having accrued. If the person entitled to bring such action, or make an entry on land or defence founded on the title to real property, be, at the time such right accrues, within the age of twenty-one years, or insane, or imprisoned on a criminal charge for any term less than for life, the suit may be brought, or the entry or defence made, within three years after the termination of such disability. But the period of limitation can in no case be extended beyond twenty years from the time the cause of action or right accrued. Upon an arrest or reversal of a judgment for the plaintiff, a new action may be commenced

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[1] Hanger *v.* Abbott, 6 Wall. 532; Coleman *v.* Holmes, 44 Ala. 124.

[2] Winthrop School Dist. *v.* Benson, 31 Me. 384; Steel *v.* Johnson, 4 Allen, 425; Schall *v.* Williams Valley R. R. Co., 35 Penn. St. 191; Ford *v.* Wilson, 35 Miss. 504; Ellis *v.* Murray, 28 Miss. 129; Graffins *v.* Tottenham, 1 W. & S. 494; Grant *v.* Fowler, 39 N. H. 103; Pederick *v.* Searle, 5 Serg. & R. 240; Armstrong *v.* Risteau, 5 Md. 256; Blair *v.* Smith, 16 Mo. 273; Hughes *v.* Graves, 39 Vt. 365.

[3] Moody *v.* Holcomb, 26 Tex. 714; Marston *v.* Rowe, 39 Ala. 722.

[4] Cooley, Const. Limit. 365.

within a year, though the period limited may have expired. The right of entry is not tolled by a descent cast. When two or more disabilities coexist, the limitation does not attach until all are removed. Code, 1896, § 2803 *et seq.*

In *Alaska*, the general laws of Oregon are made applicable to Alaska by the Revised Statutes of the United States, passed May 17, 1884. The general laws of Oregon provide that action for the recovery of real property must be brought within ten years. But no action can be maintained unless it appears that the plaintiff or his predecessor was seised of the premises within ten years before the commencement of the action. An action shall be deemed commenced when the complaint is filed and the summons is served. Infants, insane persons, and prisoners held for a term less than life, and married women, their disability shall be no part of the time, but the period within which the action shall be brought shall not be extended more than five years by any such disability, nor shall it be extended in any case longer than one year after such disability ceases. Personal representatives are allowed one year. No person shall avail himself of any disability which did not exist when the cause of action accrued. Where two or more disabilities coexist, all must be removed. Hill's Annot. Laws, 1887, p. 132 *et seq.*

In *Arizona*, action for the recovery of real property against any person in peaceable and adverse possession under title or color of title shall be instituted within three years. Action to recover against any person having peaceable adverse possession, cultivating, using, or enjoying the same, and paying taxes and claiming under a deed duly registered, shall be instituted within five years. This section does not apply to one claiming title through a forged deed. Where land is claimed by right of possession only, suits against such claim must be brought within two years. Persons under age, of unsound mind, or imprisoned shall not be subject to these acts until the disability is removed. Rev. Stat. 1887, § 2297 *et seq.*

In *Arkansas*, suits for the recovery of lands must be within seven years after the cause of action accrued; but if the person entitled to such action is under any of the disabilities before mentioned at the time the right first accrued, he may bring the same within three years next after the removal of the disability. No cumulative disability is allowed. No entry upon lands is valid as a claim, unless an action is commenced thereon within one year after such entry, and within seven years from the time when the right accrued. The right of any person to any lands shall not be impaired by a descent cast. Action against the purchaser, his heirs or assigns, for the recovery of lands sold at a judicial sale, shall be brought within five years, saving minors and persons of unsound mind, the period of three years after such disability shall have been removed. No person shall avail himself of any disability unless such disability existed at the time the right of action accrued. Dig. Stat. 1894, §§ 4815, 4817, 4818, 4845.

In *California*, actions by the State for the recovery of lands are limited to ten years from the accruing of the title or the receipt of rents and profits from some part of the land claimed. Actions by individuals are limited to five years from the last seisin or possession, and five years' adverse possession is a complete title. Persons under age, insane, or imprisoned on a criminal charge, or in the case of a married woman and her husband is a necessary party, the time of such disability

is no part of the time limited. No disability can be considered unless it existed when the right of action accrued. When two or more disabilities coexist, all must be removed. Civil Code, 1899, §§ 318, 351, 352, 357.

In *Colorado*, possession under color of title and payment of taxes for five years constitutes a valid title. Insane persons, prisoners, infants, married women, and persons without the United States when the cause of action accrued, may bring the action when the disability is removed. Mills' Annot. Stat. 1891, §§ 2923, 2915.

In *Connecticut*, entry into land is limited to fifteen years next after the right first accrued; and no entry is sufficient unless an action is commenced thereupon, and prosecuted with effect, within one year next after the making thereof; provided, that if the person who has such right is, at the time of its first accruing, within the age of twenty-one years, *feme covert*, *non compos mentis*, or imprisoned, he or his heirs may bring an action, or make an entry, within five years after the removal of the disability, or, in case of the death of such person entitled to the action, within five years after the death. Upon the reversal of a judgment rendered for the plaintiff, a new action may be brought within one year. Gen. Stat. 1888, § 1368.

In *Delaware*, the right of entry into any land is barred after twenty years after the right first accrued; and no action for or in respect to any real property can be maintained, unless the plaintiff, his ancestor or predecessor, has had actual seisin or possession of the premises within such time. But if the person entitled to the action or entry is, at the time the right first accrues, an infant, or a married woman, insane, or imprisoned, the action may be brought within ten years after such disability is removed; and if such person die under any of these disabilities, any person claiming under him has the benefit of this saving. Revised Code as amended, 1893, c. 122, p. 887, § 1 *et seq.*

In the *District of Columbia*, fifteen years of uninterrupted possession will vest the fee-simple in the possessor, except as to claimants disabled from suing, and in such case suit must be brought within one year after disability is removed. Comp. Stat. c. 42.

In *Florida*, no action for the recovery of real property shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within seven years before the commencement of such action. If any person entitled to bring an action for the recovery of real property, or to make an entry, be within the age of twenty-one years, or insane, or imprisoned, such action may be commenced or entry made within seven years after such disability is removed. Where a judgment for a plaintiff is reversed, a new action may be commenced within a year. Entering into possession under claim of title exclusive of any other right, founding such claim upon a written instrument, or upon a decree or judgment, with continued possession and occupation of the premises included in such instrument, decree, or judgment, for seven years, the premises so included shall be deemed to have been held adversely, but the possession of one lot shall not be deemed possession of any other lot of the same tract. Where it shall appear that there has been an actual continued occupation for seven years under a claim of title exclusive of any other right, but not founded upon a written instrument, or a judgment, or a decree, the premises so actually occupied,

and no other, shall be deemed to have been held adversely. No disability can be claimed unless it existed when the cause of action arose. Rev. Stat. 1892, § 1284 *et seq.*

In *Georgia*, adverse possession, under a written evidence of title for seven years, gives a good title by prescription. Actual adverse possession of lands by itself, for twenty years, gives good title by prescription, with the exception in favor of minors, persons imprisoned, and insane persons, each of whom shall have the same time, after the removal of such disability, to assert his claim or title to the land against the one claiming by prescription. A prescription commenced ceases as to persons under disability during such disability; and upon a removal thereof, the prior possession may be tacked upon the subsequent possession, to make out the prescription. Successive possessions may be tacked to make the prescription. Code, c. 6, § 3588 *et seq.*

In *Idaho*, action for the recovery of real property cannot be maintained unless it appears that the plaintiff or his predecessor was seised within five years before the commencement of the action. Entering into possession under claim of title exclusive of any other right, founding such claim upon a written instrument, or upon a decree or judgment, with continued possession and occupation of the premises included in such instrument, decree, or judgment for five years, the premises so included shall be deemed to have been held adversely, but the possession of one lot shall not be deemed possession of any other lot of the same tract. Actual, continual occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely. The right of a person to possession is not impaired by a descent cast. Infants, married women, insane persons, and prisoners held on criminal charges for a term less than life, are exempted until their disability is removed, and they then have five years in which to bring the action. No person can avail himself of a disability unless it existed when his right of action accrued. Rev. Stat. §§ 4036, 4040, 4042, 4070, 4075.

In *Illinois*, the right of entry is limited to twenty years next after the right accrued; and every real, possessory, ancestral, or mixed action, or writ of right, must be brought within such period. When any person is possessed of any real property by actual residence thereon, having a connected title in law or equity, deducible of record from the State or the United States, or from any officer authorized to sell such land for the non-payment of taxes, or on execution, or under any order, judgment, or decree of any court of record, such action must be brought within seven years next after possession being taken; but when the possessor acquires such title after taking such possession, the limitation begins to run from the time of his acquiring title. Such possession, to be a bar, must be continued for seven years next preceding the time of asserting the right of entry, or the commencement of the action. The heirs, devisees, and assigns of the person having such possession and title have the benefit of his possession. A provision like this, respecting the right of action within seven years, applies also to the right of entry. Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, for seven successive years, paying all taxes assessed thereon, is adjudged the legal owner; and all persons claiming under such possession before such seven years have expired, who continue and complete the same in like manner, have the benefit of this provision. One having color of title,

made in good faith, to vacant and unoccupied land, and paying the taxes assessed thereon for seven successive years, is adjudged the legal owner of the same; and others holding under him have the benefit of his possession. But such tax-payer is not entitled to the benefit of this provision, if any person, having a better paper title to such vacant and unoccupied land, pays the taxes on it for any one or more years of said term of seven years. These provisions respecting possession under claim or color of title do not extend to lands or tenements owned by the United States or the State of Illinois, nor to school and seminary lands, nor to lands held for the use of religious societies, nor to lands held for any public purpose. Nor do they extend to lands or tenements when there is an adverse title to them, and the holder of such adverse title is under the age of twenty-one years, insane, imprisoned, *feme covert*, out of the United States, and in the employment of the United States or the State of Illinois; provided such person commence an action for the recovery of such lands or tenements within three years after the removal of such disabilities, or, in case of vacant and unoccupied land, shall, within such time, pay all the taxes, with interest thereon at the rate of twelve per cent, that have been paid on such land, to the person or persons who have paid the same. Upon the reversal or arrest of any judgment for the plaintiff, or upon his being nonsuited, a new action may be brought within one year thereafter. In all cases where the person entitled to the entry or action is, at the time, under the age of twenty-one years, insane, or *feme covert*, he may make such entry or bring such action within the various times limited after the removal of such disability. If a person entitled to make entry or bring an action dies, his heirs, or persons claiming under him, may exercise such right within two years after his death, notwithstanding the time before limited in that behalf has expired; and no person shall commence an action or make a sale to foreclose any mortgage, or deed of trust in the nature of a mortgage, unless within ten years after the right of action or right to make such sale accrues. Rev. Stat. 1899, c. 83.

In *Indiana*, actions for the recovery of the possession of real estate must be brought within twenty years. Any person, being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed. If the person entitled to bring the action die before the expiration of the time limited, his representatives may bring the same within eighteen months after the death of such person. If the plaintiff fail in the action from any cause except negligence in the prosecution, or the action abate or is defeated by the death of a party, or judgment be arrested or reversed, a new action may be brought within five years after such determination. Rev. Stat. 1894, §§ 294, 297, 299, 300.

In *Iowa*, actions for the recovery of any real property must be brought within ten years after the right accrues. But minors or insane persons may commence such action within one year after attaining their majority. If the person entitled to the action die within one year next previous to the expiration of the limitation, this does not apply until one year after such death. If the plaintiff fail for any cause, except negligence, in the prosecution of his action, a new one may be brought within six months thereafter. Code, 1897, §§ 3447, 3453, 3454, 3455.

In *Kansas*, actions must be brought as follows: 1st. An action for the recovery of real property sold on execution, brought by the execution debtor, his heirs, or any person claiming under him, by title acquired, after the date of the judgment, within five years after the date of the recording of the deed made in pursuance of

the sale ; 2d. An action for the recovery of real property sold by executors, administrators, or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward or his guardian, or any person claiming under any or either of them, by title acquired after the date of the judgment or order, within five years after the recording of the deed made in pursuance of the sale ; 3d. An action for the recovery of real property sold for taxes, within two years after the date of the recording of the tax-deed ; 4th. An action for the recovery of real property not hereinbefore provided for, within fifteen years ; 5th. An action for the forcible entry and detention, or forcible detention only, of real property, within two years. Any person entitled to bring an action for the recovery of real property, who may be under any legal disability when the cause of action accrues, may bring his action within two years after the disability is removed. Gen. Stat. 1897, c. 95, §§ 10, 13.

In *Kentucky*, an action for the recovery of real property can only be brought within fifteen years after the right first accrued to the plaintiff, or to the person through whom he claims. If, at the time the action accrued, such person was an infant, married woman, or of unsound mind, such person, or the person claiming under him, may bring the action within three years after the removal of such disability, or death of the person under disability : cumulative disabilities are not allowed. The period within which the action may be brought cannot in any case, by reason of any death, or the existence or continuance of any disability, be extended beyond thirty years from the time the right first accrued. Where an occupant of land, or the person under whom he claims, has a connected title thereto in law or equity, deducible of record from the Commonwealth, and has had an actual occupancy of the same by settlement thereon for seven years, such possession is a bar to any right of entry or action under an adverse title. But this limitation does not apply to a person who is an infant, a married woman, one of unsound mind, or out of the United States, in the employment of the United States or of the State, until seven years after the removal of such disability ; but the disability of one of several claimants saves only his own right, and not that of another. The time within which an action for the recovery of real property may be brought, shall not be extended by reason of any disability which did not exist when the right of action accrued. Stat. 1894, c. 80.

In *Louisiana*, thirty years' possession prescribes land, though possessed without any title. If possessed fairly and honestly, and by just title, ten years' possession will be sufficient. There is a prescription of four years, running against a minor upon coming of age, as to any real estate alienated by the tutor in cases not provided by law. Minors cannot be prescribed against. Husbands and wives cannot prescribe against each other. Merrick's Rev. Civil Code, arts. 362, 3475, 3478, 3522, 3523.

In *Maine*, lands cannot be recovered unless action is brought within twenty years after the right accrued, or unless within twenty years after the claimant or those under whom he claims were seised or possessed of the premises ; except as hereinafter provided. If such right or title first accrued to an ancestor or predecessor, under whom the demandant claims, said twenty years shall be computed from the time when the right first accrued. If a minister or other sole corporation is disseised, any of his successors may make entry. An infant, married woman, insane person, one imprisoned or absent from the United States, may bring action within ten years after the removal of such disability. Rev. Stat. Me. 1883, c. 105.

In *Maryland*, whenever land is taken up under a common or special warrant, or warrant of re-survey, escheat, or proclamation warrant, any person, body politic or corporate, may give in evidence, under the general issue, his possession thereof; and if it appears in evidence that the person, body politic or corporate, or those under whom they claim, have held the lands in possession for twenty years before the action brought, such possession is a bar to all right or claim derived from the State under any patent issued upon such warrant. Gen. Laws, art. 57, § 9, p. 947.

In *Massachusetts*, no person can commence an action for the recovery of lands or make an entry thereon, unless within twenty years after the right of action or of entry first accrued, or after he or those under whom he claims have been seised or possessed of the premises. But if such right or title first accrued to an ancestor or predecessor of the person who brings the action or makes the entry, or to any other person under whom he claims, the twenty years are computed from the time when the right or title so first accrued. The right of entry or of action of a person disseised is deemed to have accrued at the time of such disseisin. If he claims as heir or devisee of one who died seised, his right is deemed to have accrued at the time of such death, unless there is an intervening estate; in which case his right is deemed to accrue when such estate expires, or would have expired by its own limitation. His right, so far as it is affected by any limitation prescribed in any remainder or reversion, is deemed to accrue when the intermediate or precedent estate would have expired by its own limitation, notwithstanding any forfeiture thereof for which he might have entered at an earlier time. He may enter, however, when entitled to do so by reason of any forfeiture or breach of condition; and if he claims under such a title, his right is deemed to have accrued when the forfeiture was incurred, or the condition was broken. In all cases not otherwise specially provided for, the right is deemed to have accrued when the claimant, or the person under whom he claims, first became entitled to the possession of the premises, under the title upon which the entry or the action is founded. If any minister or other sole corporation is disseised, any of his successors may enter upon the premises, or bring an action for the recovery thereof, at any time within five years after the death, resignation, or removal of the person so disseised, notwithstanding the twenty years after such disseisin have expired. If, at the time when such right first accrues, the person entitled to it is within the age of twenty-one years, disabled by marriage, insane, imprisoned, or absent from the United States, such person, or any one claiming under him, may make the entry or bring the action at any time within ten years after such disability is removed, though the twenty years before limited have expired. And if such person dies under these disabilities, the entry may be made or the action brought by his heirs, or any other person claiming under him, at any time within ten years after his death, notwithstanding said twenty years have expired. But in such case no further time is allowed on account of the disability of any other than the first person who was under disability, and died without having recovered the premises. A person is not deemed to have been in possession, unless he has continued in open and peaceable possession of the premises for one year next after such entry, or unless an action is commenced upon such entry and seisin within one year after he is ousted or dispossessed. When the right of entry or action of a tenant in tail or remainder-man is barred by limitation, the estate-tail, and all remainders and reversions expectant thereon, are

also barred. When a tenant in tail or remainder-man dies before the expiration of the period of limitation, no person claiming any estate which the tenant in tail or remainder-man might have barred can make an entry or bring an action to recover such land, except within the period during which the tenant in tail or remainder-man, if he had so long lived, might have made such entry, or brought such action. Suits for the recovery of lands in behalf of the Commonwealth must be brought within twenty years, except as to the Province lands in the town of Provincetown, and land owned by the State in the basin of the Back Bay. A notice given to prevent the acquisition of an easement is deemed so far a disturbance of the right in question as to enable the party claiming it to bring an action of tort as for a nuisance or disturbance, for the purpose of trying the right. On the abatement of the action by the death of any party thereto, or on reversal or arrest of judgment, a new action for the same cause may be brought at any time within one year after the determination of the original action, or after the reversal of the judgment. Pub. Stat. 1882, c. 196, p. 1112 *et seq.*

In *Michigan*, it is provided, that actions for the recovery of lands, or the possession thereof, shall be brought within fifteen years after the right of action or of entry shall have first accrued to the plaintiff, or to some person through whom he claims; except that where the defendant claims title to the land by deed made upon a sale thereof by an executor, administrator, or guardian, or by a sheriff under process of court, it shall be within five years; and within ten years where the defendant claims title under a deed made by some officer of the State or of the United States, upon the sale of land for taxes. These periods of limitation are computed from the time when the right or title first accrued to the plaintiff, or to his ancestor, predecessor, grantor, or other person from whom he claims. The person establishing the legal title to the premises is presumed to have been possessed thereof within the time limited for bringing the action, unless it appear that the same have been possessed adversely to such legal title by the defendant, or by those from whom he claims. If the person entitled to entry be a minor, a married woman, insane, or imprisoned, or absent from the United States, unless within one of the British provinces of North America, he may make such entry, or bring such action, at any time within five years after such disability is removed. Upon the death of such person under disability, the entry may be made or the action brought by his heirs, or any one claiming under him, at any time within five years after his death. Annot. Stat. 1882, §§ 8698, 8708; Supplement, 1890, § 8698.

In *Minnesota*, actions for the recovery of real property, or for the recovery of the possession thereof, cannot be maintained, unless the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises within fifteen years before the commencement of the suit. If the person entitled to the action be, at the time it accrues, within the age of twenty-one years, insane, or imprisoned on a criminal charge, or in execution under sentence as a criminal, for a time less than his natural life, the time of such disability is not a part of the time limited, except that the period cannot be extended more than five years by any disability except infancy, nor longer than one year after the disability ceases. If the person entitled to the action die before the expiration of the time limited, his representatives may commence an action within one year; and when judgment for the plaintiff is arrested or reversed, he may commence anew within one year. Stat. 1891, §§ 4688, 4705 *et seq.*

In *Mississippi*, no person may make an entry or commence an action to recover any land but within ten years after the time at which the right to make such entry, or to bring such action, shall have first accrued to him, or to some person through whom he claims. But if at such time the person entitled to make the entry or bring the action was under any of the disabilities of infancy, or unsoundness of mind, such person, or any one claiming under him, may, notwithstanding the period of ten years shall have expired, make an entry or bring an action at any time within ten years after the removal of such disability, or the death of such person under the disability. After the death of such person under disability, no further time beyond ten years is allowed for the disability of any other person. The same provisions apply to suits in equity to recover land, except that, in the case of a concealed fraud, the right of action is deemed to have accrued at the time when the fraud shall, or with reasonable diligence might, have been first known or discovered. Ten years' adverse possession makes a complete title. Annot. Code, c. 83, §§ 2730, 2731, 2734.

In *Missouri*, actions for the recovery of lands, or for the recovery of the possession thereof, cannot be commenced or maintained, unless the plaintiff, his ancestor, predecessor, grantor, or other person under whom he claims, was seised or possessed of the premises within ten years before the commencement of such action. No entry is deemed valid as a claim unless an action is commenced within one year after the making such entry, and within ten years from the time the right accrued. Descent cast shall not impair the right to possession. If the person entitled to the action be, at the time his right accrues, within the age of twenty-one years, insane, or imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence for any time less than life, or a married woman, he may bring his action within three years after such disability is removed provided that no action shall be commenced or entry made by any person under such disabilities after twenty-four years from the cause of the action or right of entry accrued. The possession of part of a tract or lot of land in the name of the whole, and with the usual acts of ownership over the whole, is deemed a possession of the whole. If any person die under the disabilities specified, his heirs, or any person claiming under him, may bring the action within three years after his death. Rev. Stat. §§ 4262–4267.

In *Montana*, no action for the recovery of real property can be maintained, unless it appears that the plaintiff or his predecessor was seised of such property within ten years before the commencement of the action. Occupation under a written instrument, judgment, or decree, such possession so included after ten years of occupation and possession shall be deemed to have been adversely held. Occupation not under a written instrument, judgment, or decree, the land actually occupied shall be deemed to have been adversely held, and no other. Descent cast shall not impair any right to possession. Persons under disability may bring the action within ten years after the disability is removed. Code, c. 2, Part III. § 483 *et seq.*

In *Nebraska*, action to recover lands must be brought in ten years after the cause of action accrues ; and if the claimant is married, imprisoned, insane, or a minor, in ten years after the removal of such disability. Comp. Stat. 1899, §§ 5596, 5597.

In *Nevada*, five years is the limitation for actions for entry. The right of a person to the possession of any real property shall not be impaired by a descent cast. Infants, married women, insane persons, and persons imprisoned for less than life, may make entry within five years after the removal of such disability. Gen. Stat. 1885, §§ 3633, 3641, 3643.

In *New Hampshire*, actions for the recovery of any real estate must be brought within twenty years after the right first accrued to the plaintiff, or to any person under whom he claims. If the person first entitled to maintain an action for the recovery of such estate was within the age of twenty-one years, or insane, at the time such right accrued, such action may be commenced within five years after such disability is removed. Pub. Laws, 1901, c. 217, §§ 1, 2.

In *New Jersey*, the right of entry into any lands, tenements, or hereditaments, or of action for the same, is barred after twenty years from the time when the right of entry or cause of action first accrued; provided that the time during which the person having such right or title shall have been under the age of twenty-one years, or insane, shall not be taken or computed as part of the said limited period. Upon a reversal or arrest of judgment given for the plaintiff, he or his representatives may commence a new action for the same within one year from such time. Adverse possession for sixty years makes a good possessory title, and adverse possession for thirty years based upon a title acquired in good faith from one in possession, bars all former titles not accompanied with possession, except where the claimants have been under some disability during that time. Gen. Stat. 1895, p. 1971 *et seq.*

In *New Mexico*, possession of land for ten years gives good title in fee-simple. But infants, married women, insane persons, and prisoners, or persons beyond the limits of the United States, shall bring the action within three years after the disability is removed. No cumulative disability is allowed. Comp. Laws, 1897, §§ 2937, 2938.

In *New York*, no action for the recovery of any real property, or for the recovery of the possession thereof, can be maintained, unless the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises within twenty years before the commencement of such action; and no action, or defence to an action, founded upon the title to real property, or to rents or services out of the same, is effectual, unless the party prosecuting the action or making the defence was in such manner possessed of the premises within twenty years. No entry is deemed valid as a claim unless an action be commenced thereupon within one year after the making of such entry, and within twenty years from the time when the right accrued. The person establishing a legal title to the premises is presumed to have been possessed of them within the time required by law; and the occupation of another person is deemed to have been under such legal title, unless the premises appear to have been held adversely for twenty years before the commencement of such action. When the occupation is under claim of title founded upon a written instrument, as being a conveyance, or upon the decree or judgment of a competent court, and is continued for twenty years, it is deemed to have been adverse, except that the possession of one lot is not deemed a possession of any other lot of the same tract. Land claimed in such manner is deemed to have been adversely possessed, — 1. Where it has been usually cultivated or im-

proved ; 2. Where it has been protected by a substantial enclosure ; 3. Where, although not enclosed, it has been used for the supply of fuel, or of fencing-timber for the purposes of husbandry, or the ordinary use of the occupant ; 4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated. Where there has been an actual continued occupation, not founded upon a written instrument, judgment, or decree, the premises so actually occupied are deemed to have been held adversely ; and in such case, land is deemed to be held adversely, — 1. Where it has been protected by a substantial enclosure ; 2. Where it has been usually cultivated or improved. The possession of a tenant is deemed the possession of the landlord until the expiration of twenty years from the termination of the tenancy, or from the last payment of rent where there was no written lease. If the person entitled to commence the action or make the entry or defence be, at the time his right first accrues, within the age of twenty-one years, insane, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offence for a term less than life, the action may be commenced, or the entry or defence made, within ten years after the disability shall cease, or after the death of the person entitled who shall die under such disability. The State cannot sue for any real property unless the right or title of the people shall have accrued within forty years, or unless the people or those from whom they claim shall have received the rents and profits within such time. Bliss' Annot. Code, 1895, vol. 1, c. 4, § 362 *et seq.*

In *North Carolina*, no person can enter or make a claim to any real property but within seven years next after his right first accrues ; and no action for the recovery of real estate shall be maintained, unless the claimant, or those under whom he claims, were in possession within twenty years before the commencement of such action. A person in possession of real estate under colorable title for seven years can have no action or entry sustained against him ; provided, if the person entitled to any entry or claim of lands was within the age of twenty-one years, *feme covert*, *non compos mentis*, or imprisoned, such person may make an entry or commence an action within three years next after the removal of such disability of infancy, coverture, unsoundness of mind, or imprisonment. If a judgment or verdict for the plaintiff is reversed or arrested, he may commence a new action at any time within a year thereafter. The possession of any real property for twenty-one years, under color of title, and under known and visible lines or boundaries, is a bar to the State. Code, 1883, vol. 1, pp. 52–55.

In *North Dakota*, no action for the recovery of real property can be maintained unless it appears that the plaintiff, or the one he claims under, was seised of the premises within twenty years before the commencement of the action. Possession for twenty years under a claim founded upon a written instrument, judgment, or decree, the premises included in such instrument, judgment, or decree shall be deemed to have been held adversely. When an actual occupation under a claim not founded upon a written instrument, judgment, or decree, the premises so actually occupied shall be deemed to have been adversely held. Infants, insane persons, and persons imprisoned for less than life, have ten years after their disability is removed. Descent cast shall not impair any right to possession. Rev. Code, § 5188 *et seq.*

In *Ohio*, an action for the recovery of the title or possession of lands, tenements, or hereditaments can only be brought within twenty-one years after the cause of such action shall have accrued. But if a person entitled to such action be, at the time this right or title first accrues, within the age of twenty-one years, insane, or imprisoned, he may bring such action within ten years after such disability is removed. If the action be commenced in due time, and a judgment for the plaintiff be reversed, or if he fail otherwise than upon the merits, and the time limited shall have expired, the plaintiff, or if he die, and the cause of action survive, his representatives, may commence a new action within one year after such reversal or failure. Rev. Stat. (7th ed.) §§ 4977, 4978, 4991.

In *Oklahoma*, action for the recovery of real property must be brought within fifteen years. A person being under legal disability when the action accrues may bring an action within two years after the disability is removed. Stat. 1893, c. 66, art. 3, § 16.

In *Oregon*, the statute is like that of Minnesota, except that the time while the party entitled to the action is under the legal disabilities mentioned is not to be a part of the time limited in any case. Also the statute is the same as that of Alaska. See Alaska and Minnesota, *ante*.

In *Pennsylvania*, the right of entry into any real estate is barred after the expiration of twenty-one years after the right first accrued, and the right of action to recover lands is barred by the same period. But if any person or persons, having such right or title, are within the age of twenty-one years, *feme covert*, *non compos mentis*, or imprisoned, then such person or persons and their heirs may bring their action or make their entry within ten years after the removal of such disability; and in case such person or persons die within the said term of ten years, under such disabilities, the heir or heirs of such person or persons have the same benefit that such person or persons might have had by living until the disabilities ceased; and if any proceeding upon such right or title is abated, the same may be renewed within three years from the time of such abatement. Seven years' quiet possession, under an equitable title, gives an absolute title, subject to the claims of persons under disability during the seven years. In the city and county of Philadelphia, the right of entry and of action is barred after the expiration of forty years after the right first accrued. Acts 1851 and 1852. Thirty years' possession of land is evidence that the title has been parted with by the Commonwealth as between parties other than the Commonwealth; and, as against the Commonwealth, twenty-one years' possession perfects a defeasible estate. Act 27 April, 1855. Any ground-rent, annuity, or other charge upon real estate is presumed to have been extinguished after the lapse of twenty-one years without any payment or other acknowledgment of its existence. Act 27 April, 1855. By the act of April 22, 1856, it is provided that no exception respecting the limitation of actions in favor of persons under legal disabilities shall extend so as to permit any action for the recovery of any lands to be maintained after thirty years from the time the right of entry accrues. Pepper & Lewis' Dig. 1894, vol. 1, col. 2666, § 21 *et seq.*

In *Rhode Island*, where any person or persons, or others from whom he or they derive their title, either by themselves, tenants, or lessees, shall have been for the space of twenty years in the uninterrupted, quiet, peaceable, and actual seisin and possession of any lands, tenements, or hereditaments, for and during

the said time, claiming the same as his, her, or their proper, sole, and rightful estate in fee-simple, such actual seisin and possession gives a good title to such person or persons, their heirs and assigns forever; and one suing for the recovery of any such lands may rely upon such possession as conclusive title thereto; and when pleaded in bar to an action, and duly proved, it is effectual in law for barring the same. These provisions are not to be construed or taken to prejudice the rights and claims of persons under age, *non compos mentis*, or those imprisoned, or those beyond the limits, etc., of the United States, they bringing their suit therefor within the space of ten years next after such impediment is removed; or to bar any person having any estate in reversion or remainder, expectant or depending, in any lands, tenements, or hereditaments, after the end or determination of the estate for years, life, or lives, such person pursuing his title by due course of law within ten years after his right of action shall accrue. Gen. Laws, 1896, c. 205, §§ 2, 3.

In *South Carolina*, no action for the recovery of real property shall be maintained, unless it appears that the plaintiff or his predecessor was seised of the premises within ten years before the commencement of such action. Occupation under a written instrument, judgment, or decree for ten years, the premises so included shall be deemed to have been adversely held. Premises actually occupied, but not claimed under a written instrument, judgment, or decree, premises so actually possessed shall be deemed to have been adversely held and no other. Descent cast shall impair no right to possession. Infants, insane persons, and prisoners held for terms less than life, may bring action within ten years after the removal of disability. After the lapse of forty years, no action whatever will be allowed. Gen. Stat. and Code 1882, Part II. c. 2, §§ 97, 102, 104, 107, 109.

In *South Dakota*, no action can be maintained unless it is shown that the plaintiff or his predecessor was seised of the premises within twenty years. A claim of title founded on a written instrument, judgment, or decree, and there has been a continuous occupation and possession for twenty years, the premises so included shall be deemed to have been held adversely. An actual continued possession, but not founded upon any written instrument, judgment, or decree, the premises so actually occupied shall be deemed to have been adversely held. A descent cast shall impair no rights. Infants, insane persons, and prisoners held for a term less than life shall have ten years in which to bring action after the disability is removed. Annot. Stat. 1899, §§ 6037, 6041, 6043, 6046, 6047.

In *Tennessee*, seven years' adverse possession of any lands, tenements, or hereditaments granted by this State or the State of North Carolina, under a conveyance, devise, grant, or other assurance of title purporting to convey an estate in fee, without any claim by action at law or in equity commenced within that time, vests an indefeasible title in fee; and the neglect to sue for such property for seven years after the cause of action accrues bars the action. But no title shall be vested by virtue of such adverse possession, unless such conveyance, devise, grant, or other assurance of title shall have been recorded in the register's office for the county or counties in which the land lies, during the term of the said seven years. No suit for any real property can be had but within seven years after the right accrues, except for such as have been reserved for

the use of schools. Possession is not adverse when taken and continued under a title, bond, mortgage, or otherwise in subordination to another's right. If the person entitled to commence an action is, at the time the cause of action accrues, within the age of twenty-one years, or of unsound mind, or a married woman, or beyond the limits of the United States and the Territories thereof, such person, or his representatives and privies, may commence the same within three years after the removal of such disability. Upon the reversal or arrest of judgment, the plaintiff, or those claiming under him, may commence a new action within one year. Code, 1896, § 4446 *et seq.*

In *Texas*, one who has the right of entry into any real estate must bring suit therefor within ten years after this right shall have accrued, or be forever barred. But if such person be under the age of twenty-one years, or insane, or if forcible occupation of the premises, or county containing them, by a public enemy, prevent entry, the time of such disability is not computed as a part of the period of limitation. Peaceable possession is defined to be such as is continuous, and not interrupted by adverse suit to recover the estate. A suit for the recovery of real estate, as against one in possession under title, or color of title, must be instituted within three years next after the cause of action shall have accrued; but in this limitation the duration of disability to sue, from minority, coverture, or insanity, is not computed. The term *title* is defined to mean a regular chain of transfer from or under the sovereignty of the soil; and color of title is constituted by a consecutive chain of such transfers down to the one in possession, without being regular, as for want of registry, or such defect as may not extend to or include the want of intrinsic fairness and honesty, or when the party in possession shall hold the same by a certificate of head right, land warrant, or land script, with a chain of transfers down to him in possession, provided the right of the government shall not be barred. One who shall have had five years' like peaceable possession of real estate, cultivating, using, or enjoying the same, and paying tax thereon, if any, and claiming under a deed or deeds duly registered, is held to have full title, precluding all claims, but shall not bar the government; and saving to the person or persons, having superior right and cause of action, the duration of disability to sue arising from non-age, coverture, or insanity. Ten years of such peaceable possession and cultivation, use or enjoyment, without any evidence of title, gives to such naked possession full property, preclusive of all other claims in and to six hundred and forty acres of land, including the improvement; yet the right of the government is not barred, and there is a saving to those under disability, as above. Batts' Annot. Stat. 1899, § 3340 *et seq.*

In *Utah*, actions for the recovery of real property shall not be maintained, unless it appears that the plaintiff or his predecessor was seised of the property within seven years before the commencement of the action. One entering into possession and claiming under a written instrument, judgment, or decree, and holding for seven years, shall be deemed to have held such included premises adversely. Actual possession not founded on any written instrument, judgment, or decree shall be deemed adverse possession of that so actually occupied and no other. Descent cast shall impair no right to possession. Infants, insane persons, and prisoners held for a term less than life may commence action within two years after the removal of their disability. Rev. Stat. §§ 2859, 2862, 2864, 2868, 2872.

In *Vermont*, no action for the recovery of any lands, or for the recovery of the possession thereof, can be maintained, and no entry can be made, unless within fifteen years next after the cause of action first accrued to the person entitled to the right, or those under whom he claims. If, at such time, any person entitled to such action is a minor, insane, or imprisoned, the action may be brought within the time limited, after the disability is removed. The same period of limitation applies to the State. If the person entitled dies, his executor has two years in which to sue. If an action fails through matter of form, the plaintiff has one year in which to bring a new action. The right to possession shall not be impaired by a descent cast. Stat. 1894, §§ 1194, 1213, 1214, 1222.

In *Virginia*, an entry on or an action to recover any land must be within fifteen years next after the time at which the right first accrues. This applies to lands lying east of the Alleghany Mountains; but ten years is the limitation as to lands lying west of the mountains. No continual or other claim preserves any right of making an entry, or of bringing an action. If the person entitled to such entry or action was, at the time the right first accrued, an infant, married woman, or insane, such person, or any other claiming through him, may make an entry or bring an action within ten years after the removal of the disability, or the death of such person under disability, provided the term of limitation be in no case extended beyond thirty years after the right first accrued, but this section shall not apply to a married woman having the right to make an entry on or bring an action to recover land which is her separate estate. A descent cast shall impair no right to the possession of lands. In case of the death of a person under disability, no further period beyond ten years is allowed by reason of any disability of any other person. Code, §§ 2715, 2915 *et seq.*

In *Washington*, in an action for the recovery of real property it must appear that the plaintiff or his predecessor was seised within ten years before the commencement of the action. Infants, insane persons, and prisoners imprisoned for a term less than life, their disability shall not be a part of the time limited. Personal representatives have one year after the death in which to bring an action. On reversal of judgment one year is given. No person shall avail himself of a disability unless it existed when his right of action accrued. When two or more disabilities coexist, all must be removed. Ballinger's Annot. Codes and Stat. §§ 4797, 4810, 4813, 4814, 4815.

In *West Virginia*, "no person shall make an entry on or bring an action to recover any land but within ten years next after right so to do accrued to himself, or to persons under whom he claims. Excepted persons within five years after removal of disability." With the exception of these two terms of limitation, the law is the same as in Virginia. Code, 1899, c. 104.

In *Wisconsin*, the statute of limitations respecting real property is the same as that of New York, from which it was copied, except that a continued occupation under a claim founded on a written instrument or judgment for ten years is deemed adverse, and constitutes a bar; and the possession of a tenant is deemed the possession of the landlord until the expiration of ten years only from the termination of the tenancy, or from the last payment of rent where there is no written lease. Nor is there any limitation of actions by the State. Infants, insane persons, and prisoners held for a term less than life, may bring action within five years after the disability is removed. Sanborn & Berryman, Annot. Stat. §§ 4213, 4216, 4218.

Infants, insane persons, and prisoners held for a term less than life, may bring action within five years after the disability is removed. Sanborn & Berryman's Annot. Stat. §§ 4213, 4216, 4218.

In *Wyoming*, action for the recovery of real property must be brought within ten years after the cause of action accrues. Any person under disability may bring the action within ten years after the disability is removed. Rev. Stat. 1899, §§ 3451, 3452.

CHAPTER XCV.

TITLE BY PUBLIC GRANT.

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§ 1995. **Grant defined.** — Though the word "grant" was originally made use of, in treating of conveyances of interests in lands, to denote a transfer by deed of that which could not be passed by livery, and, of course, was applied only to incorporeal hereditaments, it has now become a generic term, applicable to the transfers of all classes of real property, and will be used in that broad sense in speaking of the formal transfer of titles to lands.[1]

§ 1996. **Of Private Act of Parliament and King's Grant.** — In the English treatises upon this subject, one mode of creating titles to lands and hereditaments is said to be by private act of parliament, and another by the king's grant. By the former is meant an act of parliament concerning a particular subject or person; by the latter, an act evidenced by letters-patent under the great seal, granting something from the king to a subject.[2]

§ 1997. **Public Grant as a Source of Title.** — By public grant, as used in this chapter, is intended the mode and act of creating a title in an individual to lands which had previously belonged to the government, in some cases the government being that of the United States, and in others that of the respective States.

§ 1998. **Aboriginal Titles in America.** — Upon the discovery and settlement of this country by Europeans, there was a kind of ownership of the territory recognized in the native tribes, though there seems to have been no well-defined idea of individual property in lands on the part of the natives, beyond, perhaps, the spot under immediate occupation.

§ 1999. **Aborigines had only Occupational Right.** — Nor has

[1] 4 Kent, Com. 494, 550; Wms. Real Prop. 147, 195; Stat. 8 & 9 Vict. c. 106, § 2; 3 Wood, Conv. 7; 2 Bl. Com. 310; Dudley *v.* Sumner, 5 Mass. 438, 471; Co. Lit. 301 *b*; Lalor, Real Estate, 249; 4 Kent, Com. 492.

[2] Cruise, Dig. Tit. 33, 34.

any title, beyond the right of occupation, been recognized in the native tribes by any of the European governments or their successors, the Colonies, the States, or the United States. The law, in this respect, seems to have been uniform with all the Christian nations that planted colonies here. They recognized no seisin of lands on the part of Indian dwellers upon it; and the Indian's deed was simply regarded as an extinguishment of his claim, and not as passing the soil or freehold. The title gained by the grantee under it grew out of his making an actual entry upon the land under a claim of title. It is accordingly true, that in none of the English patents making grants of the country is the Indian title excepted; and even Penn had begun to fix his settlement under his patent before he conferred with the Indians as to the lands.[1]

§ 2000. **Title by Discovery.** — The sovereignty and general property of the soil in the territory of the original English colonies were claimed by and conceded to Great Britain by right of discovery.[2] But the discovery of an island in the ocean gives the discoverer no title to the same. Such discovery confers on the United States the property in and sovereignty over the island, and all citizens have equal rights in respect to the same until exclusive rights have been derived from the United States.[3] The claim of England to that part of this continent which lies between Newfoundland and the Gulf of Mexico is based upon the discovery of that part of the coast by John Cabot in 1496.[4]

§ 2001. **Crown Grants to Companies and Proprietaries.** — The right of soil, and, more or less, of sovereignty, was granted to companies or proprietors by letters-patent, under which communities were formed, with greater or less powers of jurisdiction and government, into colonies, provinces, or proprietaries, according to the style and form of their organization.[5]

[1] 4 Dane, Abr. 68–70. But see "Indian Titles," 13 Alb. L. Jour. 28.

[2] See Johnson *v.* M'Intosh, 8 Wheat. 543; Martin *v.* Waddell, 16 Pet. 367.

[3] Am. Guano Co. *v.* U. S. Guano Co., 44 Barb. 27.

[4] 1 Story, Const. 3.

[5] Worcester *v.* Georgia, 6 Pet. 544. The chartered Colonies were Massachusetts, Rhode Island, and Connecticut. The Provinces were New Hampshire, New Jersey, Virginia, the two Carolinas, and Georgia. The Proprietaries were Maryland, Pennsylvania, Delaware, and New York. 1 Curtis, Const. 425.

§ 2002. **Jurisdiction of Crown Grantees.** — The jurisdiction over and disposal of the lands within the limits of these bodies politic were, as a general proposition, committed to and made subjects of the immediate governing power thereof, in place of the original jurisdiction and property of the royal government.[1]

§ 2003. **Of the Title to Lands outside of these Grants.** — All lands, however, lying outside of these colonies, remained the property of the crown as representing the nation, subject to the Indian title of occupation; and this was also true of whatever lands the crown may have acquired by treaty from other European nations.[2] It belongs to a treatise on history, rather than upon law, to trace the changes that took place in the sovereignty over and the title to the public lands which belonged to the crown and the respective colonies prior to the peace of 1783, when all jurisdiction of the mother-country over the Territories, afterwards embraced within the jurisdiction of the States, individually or collectively, was abandoned. It is therefore only necessary to start, so far as the general government is concerned, with the condition of things as they were left by the adoption of the Federal Constitution.

§ 2004. **United States Successor to British Government.** — Whatever territory had belonged to the British government became the property of the general government, as successors to the British crown. To these lands were added those extensive regions, especially to the north and west of the Ohio, which New York, Virginia, Connecticut, and other States ceded to the United States as a common fund for the joint benefit of the Union, and also the more recent purchases of Louisiana and Florida, and the acquisitions of territory by cession from Mexico. All this public domain became, from time to time, subject to the power of the general government to grant and dispose of as it saw fit; while so much of the lands as the several States acquired as successors to the Colonies, or by cession from the general government, and which had not been appropriated to the individual ownership

[1] Jackson d. Houseman *v.* Hart, 12 Johns. 81; Commonwealth *v.* Roxbury, 9 Gray, 478.

[2] See Johnson *v.* M'Intosh, 8 Wheat. 543; Worcester *v.* Georgia, 6 Pet. 548.

of citizens, was subject to a like power on the part of those States respectively.[1]

§ 2005. **Mode of disposing of Public Lands.** — In the examination of the subject, the mode of granting lands adopted by the United States will be principally considered; though the analogy between that and the forms in use in many of the States is very close, except as to the character of the surveys and divisions of the land. The system which has been in operation for the last half-century provides, in the first place, for surveys of the public lands, and a division of the same into townships and sections, and a subdivision into halves, quarters, and eighths of sections, the townships consisting of 23,040 acres, and each section of 640 acres.[2] In disposing of these lands, various modes have been adopted. Many of them have been disposed of by public sale, others by private *entry*, as it is called, upon the records of certain officers within the districts where the lands lie, by those wishing to purchase; while others are selected and designated by persons holding warrants from the government, given for meritorious services and other causes, which entitle the holders to choose and appropriate a certain number of acres; while, in some cases, these lands are disposed of by treaty or special acts of Congress which operate as grants.

§ 2006. **Patents, how issued.** — The instrument which forms the evidence of title to lands acquired in either of these ways from the government is called a *patent*. It is signed by the President, or some one appointed to annex his signature, with the seal of the United States, and is designed to define the land intended to be granted,[3] and, when regularly and properly issued, becomes a complete evidence of title. In like manner, patents under the States derive their authenticity from the great seal of the State being annexed to the same.[4] Certain preliminary measures are required in case of a purchase of lands from the government before issuing this patent; namely, the entry of the land with the proper officer, desig-

[1] Terrett *v.* Taylor, 9 Cranch, 50; 1 Kent, Com. 259; 1 Story, Const. 215.

[2] Walk. Am. Law, 42, 43.

[3] Owens *v.* Jackson, 9 Cal. 322.

[4] People *v.* Livingston, 8 Barb. 253; Doe d. Smalley *v.* McKilvain, 14 Ga. 252; Hulick *v.* Scovil, 9 Ill. 174.

nating the section, or part of section, to be conveyed, and payment of the purchase-money.

§ 2007. **The Fee of Public Unsold Lands.** — The fee of all the unsold lands in the United States is either in the United States, or in the States within which such lands are situated.[1] The Indian title, or that interest which originally belonged to the native tribes, was one of use or occupation only. It was, however, an interest which could only be divested by purchase or conquest. Accordingly, grants made by the State of Tennessee of the Cherokee lands, before the title of the tribe had been extinguished, were held to be void, and to pass no title to the grantee.[2] But this has reference to the source of title rather than to the capacity to hold lands; for a patent from the United States to an Indian makes him the owner of the ultimate title, and renders him, as such, liable to be taxed therefor.[3]

§ 2008. **Grants of the Fee Subject to Indian Occupancy.** — But it would seem that either the State or the United States, according as the one or the other owned the fee, may grant that, subject to such occupancy; but no possession can be taken until such right of occupancy is extinguished.[4]

§ 2009. **Indian Grant of Lands Northwest of the Ohio.** — But courts will not recognize a title to lands in the territory northwest of the Ohio River acquired by an individual by grant from an Indian tribe, on the ground that the nation making the discovery of the country has the exclusive right to acquire the title of the aboriginal inhabitants.[5] A title, therefore, conveyed by an Indian tribe to any one other than the sovereignty, would be of no validity.[6]

[1] Doe d. Godfrey *v.* Beardsley, 2 McLean, C. C. 412; Johnson *v.* M'Intosh, 8 Wheat. 543, 571 *et seq.*; Worcester *v.* Georgia, 6 Pet. 543; Fletcher *v.* Peck, 6 Cranch, 87.

[2] Gillespie *v.* Cunningham, 2 Humph. 19; Commonwealth *v.* Roxbury, 9 Gray, 478.

[3] Blue Jacket *v.* Johnson Co. Comms., etc., 3 Kan. 349.

[4] Doe d. Godfrey *v.* Beardsley, 2 McLean, C. C. 412; Stockton *v.* Williams, 1 Doug. (Mich.) 546; Fletcher *v.* Peck, 6 Cranch, 87.

[5] Johnson *v.* M'Intosh, 8 Wheat. 571, where the general subject of Indian title is fully examined; Worcester *v.* Georgia, 6 Pet. 543.

[6] Doe d. Godfrey *v.* Beardsley, 2 McLean, C. C. 412; Stockton *v.* Williams, 1 Doug. (Mich.) 546; Jackson *v.* Porter, Paine, C. C. 457; Jackson d. Klock *v.*

§ 2010. **Disposal of Federal Lands in States and Territories.** — Although, as a general proposition, the title to and disposition of land are subject exclusively to the laws of the country where it lies,[1] yet all the lands in the Territories are, in the first instance, the exclusive property of the United States, to be disposed of to such persons, at such times, and in such mode, as well as by such titles, as the government may deem proper, independent of locality. And no Territory or State can interfere with the exercise of this control, nor affect the title of the United States by the exercise of the right of eminent domain.[2]

§ 2011. **State cannot control Mode of Grant by United States.** — A State may by statute prescribe the remedies to be pursued in her courts, and may regulate the disposition of the property of her citizens, by descent, devise, or alienation. But where the United States has required a patent in order to pass a valid title of their lands to a purchaser, it is not competent for a State to declare that anything less than that shall originally pass a good title, though the land be situate within the limits of such State. The law of the United States in such cases is paramount to the law of the State; and the question, whether a title in such case has passed from the United States, is to be determined by the law of the latter. But, as soon as the title shall have passed from the United States, it takes the character of other property within the State, and is subject to State legislation.[3]

§ 2012. **Fee of Public Land in New Territory.** — Sovereignty over a Territory can never be in abeyance. Consequently, upon the acquisition of the present territory of California from Mexico, the sovereignty as well as the fee in all the public lands within its limits, and a full right to dispose of them, passed at once to the United States as successors to the for-

Hudson, 3 Johns. 375; Jackson d. Gilbert *v.* Wood, 7 Johns. 290; Marshall *v.* Clark, 4 Call, 268; Stevens *v.* Smith, 2 Kan. 243.

[1] United States *v.* Crosby, 7 Cranch, 115; Kerr *v.* Moon, 9 Wheat. 565; Darby *v.* Mayer, 10 Wheat. 465; Calloway *v.* Doe d. Joyes, 1 Blackf. 372; Cutler *v.* Davenport, 1 Pick. 81; Nims *v.* Palmer, 6 Cal. 8.

[2] Irvine *v.* Marshall, 20 How. 558; Pratt *v.* Brown, 3 Wis. 603.

[3] Wilcox *v.* Jackson, 13 Pet. 516, 517; Bagnell *v.* Broderick, 13 Pet. 436; Cannon *v.* White, 16 La. Ann. 89.

mer sovereign. This sovereignty passed to the State when she became clothed with State powers by a law of Congress to that effect;[1] and by this she holds the shores of the sea.[2]

§ 2013. **Property in Mines in California.** — Though the title to and sovereignty over the public lands in California passed from the crown of Spain to the government of Mexico, and through the latter to the United States, the ownership of the mines of gold and silver within the same was incident to the ownership of the soil, and not to the sovereignty of the government, and, therefore, did not pass to the State when it became such. Such mines consequently pass with the soil to patentees claiming under the United States, unless expressly reserved in the grant.[3] Such lands as belong to the United States within the limits of California, since she became a State, are held by them as private proprietors, with the ordinary incidents of such ownership, except in the matter of taxation. The United States, therefore, could not prescribe rules of property, or modes of its disposition or tenure, in derogation of the rights of the local sovereign, the State, to govern the relations of the citizens of the State. Like any other proprietor, therefore, they can only exercise the rights to the mineral on private property, in subordination to such rules as the local sovereign may prescribe.[4] So, when Alabama became a State, she acquired the shores of the navigable streams within the same by virtue of her sovereignty.[5]

§ 2014. **State Successor to Crown Lands in New York.** — Of the lands within the State of New York, not actually granted under the royal government, the people became the immediate successors to the crown;[6] and when the Revolution took place, the people of the several States acquired the absolute right to all their navigable waters, and to the soil under them.[7]

§ 2015. **Virginia's Cession to the United States.** — After the

[1] People *ex rel.* Atty.-Gen. *v.* Folsom, 5 Cal. 373; Friedman *v.* Goodwin, 1 McAll. C. C. 142.

[2] People *ex rel.* Pierce *v.* Morrill, 26 Cal. 353.

[3] Moore *v.* Smaw, 17 Cal. 199, 222, overruling Hicks *v.* Bell, 3 Cal. 219.

[4] Boggs *v.* Merced Mining Co., 14 Cal. 375, 376.

[5] Pollard *v.* Hagan, 3 How. 230.

[6] People *v.* Van Rensselaer, 8 Barb. 189; Van Rensselaer *v.* Hays, 19 N. Y. 96.

[7] Martin *v.* Waddell, 16 Pet. 367.

cession by Virginia to the United States of her military tract, she had nothing left for which she could issue a patent.[1]

§ 2016. **Fee of Lands in Pennsylvania.** — In Pennsylvania, the soil of the province as well as the sovereignty, in absolute fee-simple, was in the proprietaries upon the original constitution of that Province.[2]

§ 2017. **Fee of Lands in Massachusetts.** — In Massachusetts, the transition of title to the public lands, which, by the charter, was at first in the colonial government, was to that of the Province under the new charter, and from that to the Commonwealth at the Revolution. The fee of the soil, therefore, from that time, was in the Commonwealth, unless the government of the Colony or Province had aliened it.[3]

§ 2018. **Private Property Rights unaffected by Change of Sovereignty.** — But the cession of territory from one sovereignty to another does not, by the law of nations, independent of treaty stipulations, impair the rights of private property. The cession passes only public property, and sovereignty over the territory.[4]

§ 2019. **Of Manorial Grants in New York.** — In the early grants by the crown in the province of New York, large tracts of land were, in some cases, given to individuals with manorial rights attached thereto; and questions have arisen within a few years, how far it was competent for the crown to create new manors, after the passage of the act of *quia emptores*, 18 Edw. I. It has, however, been held that the grant of lands with such privileges was not void, and that that statute did not restrain the king from granting to his own tenants authority to grant lands, to be holden of such tenants instead of the king as superior lord; and that, even if the grant of the manorial privileges and franchises was void, it did not affect the validity of the grant of the land itself.[5] But the courts of that State hold that the principles of the statute above mentioned have always been the law of that State, as well during

[1] Miller *v.* Lindsey, 1 McLean, C. C. 32.

[2] Penns *v.* Klyne, 1 Wash. C. C. 207.

[3] Commonwealth *v.* Roxbury, 9 Gray, 478.

[4] Teschemacher *v.* Thompson, 18 Cal. 22; United States *v.* Percheman, 7 Pet. 87.

[5] People *v.* Van Rensselaer, 9 N. Y. 291.

its colonial condition as after it became an independent body politic.[1]

§ 2020. **Construction of Public Grants.** — In all questions of construction arising under grants between the government and the citizen, a different rule prevails, in one respect, from that adopted in questions between individuals. Between the latter, the construction, if doubtful, is always to be in favor of the grantee, and against the grantor; whereas, in the case of the government, the construction is always against the grantee, and in favor of the government. The act, in the latter case, is done by an agent; and nothing will be presumed beyond the letter of the grant.[2] Thus, where the government granted an estate upon condition which was broken, it was held at once to divest the title of the grantee without any entry or claim on the part of the grantors, as would have been necessary to defeat the estate if it had been a private grant.[3] The government is not subject to estoppel by a grant, unless it be by the description contained in a valid grant; nor to an implied warranty.[4] This strictness of construction in favor of the sovereign, and against the subject, applies only in cases where there is a real uncertainty or ambiguity in the terms of the grant. Nor, as it seems, is the rule applicable where the grant is for a valuable consideration. In such case, the rule of construction between the government and the subject is the same as between private grantors and grantees. And the rule may be stated as a general one, in respect to legislative grants in this country, that such grants should be construed liberally in favor of the grantee, and in such a manner as to give them a full and liberal operation, so as to carry out the legislative intent, where that can be ascertained.[5]

[1] Van Rensselaer *v.* Hays, 19 N. Y. 72, 74, controlling De Peyster *v.* Michael, 6 N. Y. 467.

[2] Hagan *v.* Campbell, 8 Port. 9; Townsend *v.* Brown, 24 N. J. 80; Allegheny *v.* Ohio & P. R. R. Co., 26 Penn. St. 355; Green's Estate, 4 Md. Ch. Dec. 349; Dubuque & Pac. R. R. *v.* Litchfield, 23 How. 88; Gildart *v.* Gladstone, 11 East, 685.

[3] Kennedy *v.* M'Cartney, 4 Port. 141.

[4] Elmendorff *v.* Carmichael, 3 Lit. 472; Allegheny *v.* Ohio & P. R. R. Co., 26 Penn. St. 355; State *v.* Crutchfield, 3 Head, 113.

[5] Hyman *v.* Read, 13 Cal. 444, 452, 455, 458; Charles River Bridge *v.* Warren Bridge, 11 Pet. 589, 596, 601; Commonwealth *v.* Roxbury, 9 Gray, 492; Martin *v.* Waddell, 16 Pet. 411.

§ 2021. **State cannot be disseised.** — A State cannot maintain an action of trespass to try the title to land, or an action of ejectment, because a State cannot be disseised. The remedy against a trespasser in such case, in favor of the State, is by information for intrusion.[1] Nor does the statute of limitation run against the State except by express statutory provision.[2]

§ 2022. **Government Grant a Livery of Seisin.** — A grant of land by the government is tantamount to a conveyance with livery of seisin.[3]

§ 2023. **Tide Water and Riparian Grants.** — It has been held that Congress does not possess the power of granting the shore of tidal navigable waters, at least within the State of Alabama.[4] But a State may grant the land adjacent to the shore and covered by the sea, subject to the right of navigation and fishing by the public in the waters of the sea. So it may grant an exclusive right of planting oysters, or erecting a wharf thereon.[5]

§ 2024. **How Titles transferred by United States.** — For the transfer by the United States, or by a State, of the title of land, no particular form is required. It may be done by special act of legislation, by a clause inserted in a treaty by the treaty-making power, or by a patent issued by one authorized to represent the sovereignty. And where the assent of the President is required to give effect to a grant, but no form for this is prescribed, it may be done in any mode he may see fit; and, when once given, it cannot be revoked.[6] And the legislature may, by a subsequent statute, confirm a grant which was void at the time of making it, and thereby give it validity, if it be of public land. A grant may be made

[1] State *v.* Arledge, 1 Bail. 551 ; Jackson d. Miller *v.* Winslow, 2 Johns. 80.

[2] People *v.* Van Rensselaer, 8 Barb. 189; Lindsey *v.* Miller, 6 Pet. 666; Jackson *v.* Winslow, 2 Johns. 80 ; Cary *v.* Whitney, 48 Me. 516.

[3] Enfield *v.* Day, 11 N. H. 520; Enfield *v.* Permit, 8 N. H. 512 ; Bellows *v.* Copp, 20 N. H. 492 ; McCaughal *v.* Ryan, 27 Barb. 376 ; Doe *v.* Craft, 1 Kerr (N. B.), 546; Robinson *v.* Lake, 14 Iowa, 424.

[4] Kemp *v.* Thorp, 3 Ala. 291 ; Mobile *v.* Eslava, 9 Port. 577 ; Pollard *v.* Hagan, 3 How. 212 ; Martin *v.* Waddell, 16 Pet. 367.

[5] Phipps *v.* State, 22 Md. 389.

[6] Doe d. Godfrey *v.* Beardsley, 2 McLean, C. C. 412 ; Stockton *v.* Williams, 1 Doug. (Mich.) 546, 560 ; Fletcher *v.* Peck, 6 Cranch, 87 ; Sargent *v.* Simpson, 8 Me. 148 ; Grignon *v.* Astor, 2 How. 319.

by law, as well as by a patent issued pursuant to law; and a confirmation by law is as fully, to all intents and purposes, a grant, as if it contained, in terms, a grant *de novo*. And such grant, or confirmation, vests an indefeasible and irrevocable title.[1] And where a grant was made by the State of Pennsylvania to one upon his paying a certain sum after a survey made, it was held, that upon a return of such survey, and payment having been made, the title and legal possession of the land vested at once in the grantee.[2]

§ 2025. **When Patent necessary.** — As a general proposition, a patent is necessary in order to pass a perfect and consummate legal title to public lands, with one exception; namely, where an act of Congress grants lands with words of present grant. And this proposition applies as well to pre-emptions as to other purchases of public lands.[3] So, in Kentucky, a patent is declared to be the completion of a legal title.[4] So it is laid down that a patent is a title from its date, and conclusive against all those whose rights did not commence previous to its emanation.[5] But when granted, a patent enures to the benefit of any one to whom the patentee is bound to convey the land, or for whose use he ought to hold it.[6] And where two patents have issued for the same land, the elder is the best evidence of title, and is conclusive against the junior so long as it remains in force.[7]

§ 2026. **Patent the Evidence of Title.** — And yet it has been laid down that the granting of the patent is a ministerial act,[8] and that it does not pass the title, but is merely evidence that

[1] Strother *v.* Lucas, 12 Pet. 454; Chouteau *v.* Eckhart, 2 How. 372; Challefoux *v.* Ducharme, 8 Wis. 306; Terrett *v.* Taylor, 9 Cranch, 50; Wilkinson *v.* Leland, 2 Pet. 657; Friedman *v.* Goodwin, 1 McAll. C. C. 142; Wilkinson *v.* Leland, 2 Pet. 662.

[2] Potts *v.* Gilbert, 3 Wash. C. C. 475.

[3] Wilcox *v.* Jackson, 13 Pet. 516; Grignon *v.* Astor, 2 How. 319.

[4] Green *v.* Liter, 8 Cranch, 229.

[5] Hoofnagle *v.* Anderson, 7 Wheat. 213; Lindsey *v.* Miller, 6 Pet. 677; Stringer *v.* Young, 3 Pet. 320; Boardman *v.* Reed, 6 Pet. 328; Moore *v.* Wilkinson, 13 Cal. 478, 487.

[6] Hennen *v.* Wood, 16 La. Ann. 263.

[7] Gallipot *v.* Manlove, 2 Ill. 156.

[8] Stoddard *v.* Chambers, 2 How. 284; Hunter *v.* Hemphill, 6 Mo. 106; Innerarity *v.* Mims, 1 Ala. 660, where a condition appended to a patent which was not authorized by law was held to be void.

it has before passed, — a doctrine which gives to the entry and payment of the purchase-money, virtually, the effect of creating the title to lands purchased.[1]

§ 2027. **Patent of Reserved Lands void.** — Accordingly, it was held, that where a patent had issued for lands which were, by law, reserved from sale, it was void ;[2] and so when made of land which had already been granted by treaty[3] or otherwise.[4]

§ 2028. **Effect of Register's Certificate.** — It is held, that a certificate of the register of the land-office, that a purchase had been made of lands, is of as high a nature as a patent itself.[5] But the issuing of a patent is always presumptive evidence in itself that the previous proceedings have been regular, unless it can be shown that the land to which it relates had been expressly reserved from sale.[6] Where, therefore, a patent and a certificate of payment for the same tract of land conflicted with each other, having been issued to different persons, the court intimate that the grantee of the United States by patent would be preferred over the one who only held a certificate of payment.[7]

§ 2029. **Of Conflict between Patent and Entry.** — So it is held that a patent is a better legal title to land than an entry with a register and a survey,[8] and that a patent is a conveyance from the primitive owner of the soil, its recitals being evidence against one who claims under him by a subsequent conveyance, or does not pretend to claim under him at all ; and in an action of ejectment, a patent issued to the plaintiff is of itself evidence of title, which it is incumbent upon his adversary to rebut.[9]

§ 2030. **Patent cannot be impeached collaterally.** — So, un-

[1] Goodlet *v.* Smithson, 5 Port. 243 ; Waterman *v.* Smith, 13 Cal. 419.

[2] Stoddard *v.* Chambers, 2 How. 284 ; Hunter *v.* Hemphill, 6 Mo. 106.

[3] Stockton *v.* Williams, 1 Doug. (Mich.) 560 ; letcher *v.* Peck, 6 Cranch, 87.

[4] New Orleans *v.* De Armas, 9 Pet. 224.

[5] Jackson d. McConnell *v.* Wilcox, 2 Ill. 344 ; Jennings *v.* Whitaker, 4 Mon. 50.

[6] Barry *v.* Gamble, 8 Mo. 88 ; Stringer *v.* Young, 3 Pet. 320 ; Boardman *v.* Reed, 6 Pet. 328 ; Minter *v.* Crommelin, 18 How. 87.

[7] Goodlet *v.* Smithson, *supra.*

[8] Griffith *v.* Deerfelt, 17 Mo. 31.

[9] Steiner *v.* Coxe, 4 Penn. St. 28 ; Bagnall *v.* Broderick, 13 Pet. 436 ; Hill *v.* Miller, 36 Mo. 182.

less letters-patent for land are void upon their face, or the issuing of them is without authority, or is prohibited by law, they cannot be impeached collaterally, in a court of law, upon the trial of an ejectment; and the same is true of a grant.[1] The survey and patent, under the laws of the United States, are conclusive evidence of the title to the land embraced within their description. And where there had been two confirmations of the same land, the elder of these prevailed.[2] A patent, moreover, relates back to the original land-office certificate, and the purchaser's title dates from that time.[3]

§ 2031. **Effect of Entry and Payment.** — On the other hand, it has been held, that a purchaser from the United States, by the act of entry and payment, acquires an inchoate legal title which may be aliened, will descend, and may be divested in the same manner as any other legal title; that an estate held by one, after certificate of final payment made, may be taken on execution before the patent has issued;[4] that land held by entry descends to heirs, or may be devised;[5] and that, if one entitled to a certificate or patent under the law of Congress dies, the certificate or patent issues to his heirs.[6] The land is segregated from the public domain,[7] and is now liable for State taxes.[8] In another case it was held, that a certificate of final payment was such evidence of a legal title, that an ejectment could be maintained upon it.[9] And yet the fee of the land remains in the United States until the patent has actually issued; and this is a better legal title than a prior entry.[10]

§ 2032. **Rights of Purchasers.** — A patent obtained by fraud,

[1] People *v.* Livingston, 8 Barb. 253; Curle *v.* Barrel, 2 Sneed, 68; Parker *v.* Claiborne, 2 Swan, 565; Stringer *v.* Young, 3 Pet. 320; Boardman *v.* Reed, 6 Pet. 328; Moore *v.* Wilkinson, 13 Cal. 478, 487.

[2] Willot *v.* Sandford, 19 How. 79.

[3] Cavender *v.* Smith, 8 Iowa, 360.

[4] Goodlet *v.* Smithson, 5 Port. 243; Wright *v.* Swan, 6 Port. 84.

[5] Adams *v.* Logan, 6 B. Mon. 175.

[6] Shanks *v.* Lucas, 4 Blackf. 476; Forsythe *v.* Ballance, 6 McLean, C. C. 562. See *post*, § 2034.

[7] Deffeback *v.* Hawke, 115 U. S. 392.

[8] Carroll *v.* Safford, 3 How. 441.

[9] Bullock *v.* Wilson, 2 Port. 436. See also Copley *v.* Riddle, 2 Wash. C. C. 354; Vanhorn *v.* Chesnut, id. 160.

[10] Carman *v.* Johnson, 20 Mo. 108.

or against law, or for reserved lands, does not carry the legal title, nor affect a subsequent patent.[1] And a purchaser, who has done all that the law requires of him to entitle him to a patent of land, cannot be affected by the ignorance, negligence, or want of fidelity, of the government officers.[2] And if a register of the land-office has duly admitted the location of land, and granted a certificate thereof, a subsequent sale of the same land is void, although to a *bona fide* purchaser without notice.[3]

§ 2033. **Entry and Purchase prevails over Subsequent Act of Congress.** — So an entry and purchase of land from the United States made *bona fide* will prevail over a subsequent location and survey confirmed by act of Congress.[4]

§ 2034. **The Title before Patent issues.** — When a purchase of public land has been consummated, it frequently happens that there is a long delay in securing the patent. Judge McLean thus explains the relation of lands in this situation: "Until the patent is issued, the purchaser has not the legal title; but having made his entry of the land, and paid for it, the government can no more dispose of the land to another person than if the patent had been issued. The final certificate, obtained on payment of the money, is as binding on the government as the patent. Lands thus purchased go to the heirs, and not to the administrators, and, in some States, are liable to be sold on execution before the patent issues. When the patent issues, it relates back to the entry, and makes good any conveyance which the purchaser may have made." [5]

§ 2035. **Certificate prevails over Subsequent Patent.** — A prior certificate of entry, where no patent has issued, gives a better title in equity than a patent issued upon a subsequent entry, and the patent will be set aside on a process for that purpose.[6] So where a patent was dated February, 1822, of land

[1] Wright *v.* Rutgers, 14 Mo. 585.

[2] Nelson *v.* Sims, 23 Miss. 383.

[3] Moyor *v.* McCullough, 1 Ind. 339.

[4] Waller *v.* Von Phul, 14 Mo. 84.

[5] Astrom *v.* Hammond, 3 McLean, C. C. 107. See also Mix *v.* Smith, 7 Penn. St. 75; Garretson *v.* Cole, 2 Harr. & M'H. 459; West *v.* Hughes, 1 Harr. & J. 6; Blackw. Tax Titles, 453; Cavender *v.* Smith, 5 Iowa, 189; Carman *v.* Johnson, 29 Mo. 94; Deffeback *v.* Hawke, 115 U. S. 392.

[6] Hester *v.* Kembrough, 12 Sm. & M. 659; Warren *v.* Shuman, 5 Tex. 441; Hunt *v.* Wickliffe, 2 Pet. 201; Simmons *v.* Wagner, 101 U. S. 260.

which had been granted by the United States, and the grant accepted in December, 1821, it was held that the title was in the grantee in preference to the patentee.[1] But ejectment will not lie upon an entry in a land-office: it will only lie upon a patent.[2]

§ 2036. **Land-office must convey by Official Surveys.** — Under the United States system of disposing of the public lands, it is not competent for the surveyor-general to divide a fractional part of a section by arbitrary lines, so as to prevent a regular quarter section from being taken up by entry, if the fraction will admit of such a division;[3] and it is always deemed a sufficient description of land to refer to it by the range, township, and section, as contained in the public surveys.[4]

§ 2037. **Grant on Condition which becomes Impossible.** — If, in making a grant, there be a condition subsequent annexed which becomes impossible by act of the grantor, the estate becomes absolute.[5]

§ 2038. **Effect of Purchaser's Death before Issuance of Patent.** — Different rules have been adopted by different courts, in case of the decease of a person entitled to the benefit of an entry and purchase of land before any patent has issued, some of which have already been stated.[6] In one case, a patent which had issued to a person then deceased was held to enure to the benefit of his heirs in the same manner as if it had issued in his lifetime;[7] in another, such patent was held to be void;[8] while in another it was held that an entry and survey in the name of a dead man is void, though he held a warrant therefor in his lifetime.[9]

§ 2039. **Entry under Land Warrants.** — An entry under a land warrant can only be made in the name of the person to

[1] Cabunne *v.* Lindell, 12 Mo. 184.
[2] Hooper *v.* Scheimer, 23 How. 235.
[3] Brown *v.* Clements, 3 How. 650.
[4] Bledsoe *v.* Doe, 4 How. (Miss.) 13.
[5] United States *v.* Arredondo, 6 Pet. 691.
[6] *Ante*, § 2031.
[7] Schedda *v.* Sawyer, 4 McLean, C. C. 181.
[8] Wood *v.* Ferguson, 7 Ohio St. 288; Galloway *v.* Finley, 12 Pet. 264.
[9] Price *v.* Johnston, 1 Ohio St. 390.

whom it was issued, or that of his assignee.[1] And a patent issued to a fictitious person conveys no title to the land therein described.[2]

§ 2040. **Land Warrants, whether Realty or Personalty.** — It may be stated, that, in some of the States, land warrants are not regarded as real estate in the settlement and distribution of estates in the probate-office.[3] But a different doctrine is held in Virginia and Ohio, in respect to land, where one who is entitled to a patent dies before it is issued. The right, unless devised, goes to his heirs.[4]

§ 2041. **United States Pre-emption and Homestead Laws.** — [Former editions of this work contained a discussion of the Federal pre-emption act and a presentation of the decisions of the courts upon rights arising under pre-emption entry. The pre-emption act (R. S. chap. 4) was repealed March 3, 1891 (26 Stat. at L. 1095), and consequently the treatment of it is omitted. By the homestead act (R. S. chap. 5, as amended by act of March 3, 1891, § 5), certain settlers on the public land, upon complying with certain conditions, the principal of which is a five years' residence on the land, may acquire title to the land entered, not to exceed one quarter section. The legal title is in the United States until the patent issues,[5] and until then the land cannot be made liable for the payment of any debt contracted prior thereto.[6] The land cannot be mortgaged or sold until the right to the patent is perfected: a mortgage before that time would be void.[7] Agreements to convey entered into before final proof made, are void at law and in equity.[8] The statute is very explicit as to the mode of acquiring the title and the rights of settlers between entry and final proof. The reader who finds it necessary to investigate the act in detail is referred to Gould & Tucker's Notes on the Revised Statutes, §§ 2289–2317.]

[1] Galt *v.* Galloway, 4 Pet. 332.

[2] Thomas *v.* Wyatt, 25 Mo. 24; Thomas *v.* Boerner, id. 27.

[3] Moody *v.* Hutchinson, 44 Me. 57.

[4] Brush *v.* Ware, 15 Pet. 93; Reeder *v.* Barr, 4 Ohio, 458.

[5] Shiver *v.* United States, 159 U. S. 491.

[6] Seymour *v.* Sanders, 3 Dill. 437; Baldwin *v.* Boyd, 18 Neb. 444; s. c. 25 N. W. Rep. 580.

[7] Webster *v.* Bowman, 25 Fed. Rep. 889.

[8] Shorman *v.* Eakin, 47 Ark. 351; s. c. 1 S. W. Rep. 559.

§ 2042. **Public Grants in New England.** — King James I. made a grant of all that part of America lying between the fortieth and forty-eighth degrees of latitude, "and in length of, and within all the breadth aforesaid, throughout all the main lands from sea to sea," to the Plymouth Company in England. In 1629, this corporation granted the territory of the Colony of New Plymouth to Bradford and his associates, who had for years been in possession thereof, and exercised the power of disposing of the lands therein. The same company, by deed or charter, conveyed to Sir Henry Roswell and others the territory of the Colony of Massachusetts Bay in 1627; and a patent, incorporating the grantees as a government, was made to them by King Charles in 1628. This government assumed the right to divide out and grant the lands in the colony, independent of any other authority. And in this way the territory of many townships had been granted to proprietors, or companies of proprietors, who were made corporations for the purpose of managing such territory, and was regulated and controlled by the legislation of the colony, in which both the soil and the sovereignty of the territory were united. These legislative grants vested in the grantees and their heirs estates in common; and such is the rule of construction in respect to all grants made to two or more persons by virtue of acts or resolutions of the legislature.[1] Thus, among other acts, authority was given, in 1636, to the freemen of every town to dispose of their lands.[2] A simple act of incorporation, however, without words of grant of the soil, would vest no part of the property of the government in such town.[3] It is said, besides, that no formal act of incorporation of any of these towns was passed during the continuance of the colonial charter.[4] There was a practice, after the establishment of the provincial government by the charter of 1692, to grant a tract of land or township to a body of individuals named, constituting them proprietors and tenants in common, with a view to

[1] Higbee *v.* Rice, 5 Mass. 350.

[2] Rogers *v.* Goodwin, 2 Mass. 475; Commonwealth *v.* Roxbury, 9 Gray, 479; Sulliv. Land Tit. 37, 48, 49; Mass. Col. Law, 195; Commonwealth *v.* Alger, 7 Cush. 53, 66.

[3] Commonwealth *v.* Roxbury, 9 Gray, 494.

[4] Ibid.

their incorporation afterwards as a town. But then they took the fee in the land by force of the act of incorporation when once passed.[1] It is apprehended, that not only had extensive grants been made by the colony, by means of legislative acts, under its first charter, but that the titles of individuals were, in numerous instances, mere grants from towns or proprietaries, evidenced by no other act or instrument than the votes adopted and recorded by those bodies corporate. But, upon the dissolution of the charter under which these titles had taken their rise, one of the first measures of Andros, the new governor, was to treat them as of no validity, and to require the proprietors to take out new grants and patents from the crown. The mischief threatened by such a sweeping overthrow of titles was obviated by the forcible deposition of the governor, and the grant of a new charter in 1692, embracing Plymouth and Massachusetts, with the Province of Maine, Sagadahoc, Nantucket, and Martha's Vineyard, by which the land was granted to the inhabitants of the Province, and the former grants already made were ratified and confirmed; and the General Court, with the approbation of the governor, had authority to make new grants. At the Revolution, the State became successor to the Province, with all its rights as to lands then undisposed of.[2] In disposing of these lands, the General Court still continued to proceed by way of grants by legislative acts, and to create proprietaries who managed their business as corporations by means of recorded votes.[3] It has accordingly been held that the government may grant the lands of the Commonwealth without any deed. And where the General Court granted lands to proprietors by vote, which bounded

[1] Commonwealth *v.* Roxbury, 9 Gray, 500, 501. For a further account of the charter and its history, see 9 Gray, 505 *et seq.*

[2] Sulliv. Land Tit. 55, 57; 1 Barry, Hist. Mass. 493–495; Washb. Jud. Hist. 112.

[3] In some cases, grants of a million or more acres were made, as in the case of the Kennebec, Pejepscut, and Waldo Patents. In 1712, proprietors of common lands were, by law, authorized to organize themselves and act as corporations, and to manage their lands by corporate votes. This general power of proprietors of wharves, common lands, etc., to act as corporations, still subsists; though it is apprehended it is no longer competent for such proprietaries to convey their lands by vote. 4 Dane, Abr. 120; Gen. Stat. c. 67. See Higbee *v.* Rice, 5 Mass. 350.

upon the sea, in 1640, it was held that their subsequent ordinance of 1647, annexing the flats adjacent to upland so as to pass with that, enured to the benefit of these first-mentioned proprietors.[1] And the doctrine that a State may grant its lands by a resolve of its legislature is adopted both in Maine and California, and may be effectual without a deed or a patent.[2] But where the legislative resolve contains no words of grant, but simply authorizes a public officer to convey land to the person named, the title will not pass till such deed is executed and delivered.[3] In grants of townships in Massachusetts, the fee of the land vested in the proprietors, who might grant their lands to individuals ; and, among other things, they might grant the waters of the ponds therein, and rights of control over these. But, after the ordinances of 1641 and 1647, "great ponds were to be held for the public use of the inhabitants thereof, for fishing, fowling, bathing, and the use of the waters for washing, watering cattle, etc." The cutting of ice is one of these uses ; so is boating, skating, or riding on the ice ; and all these are free and lawful to all persons who can obtain lawful access to them over their own lands, or those of others without being trespassers. But they are not to be used by any so as to interfere with the reasonable use of these ponds by others.[4] It has been done by resolve ; and, since the adoption of the Constitution, committees of the legislature have given deeds setting forth the authority under which they acted, and affixing their own seals.[5] In construing legislative conveyances, great liberality was applied in carrying out the intention of the grants, giving to these votes the effect of limiting a fee without words of succession or inheritance when necessary.[6] Such grants made the grantees tenants in common.[7] And when, in 1651, an act of the legislature required

[1] Tappan *v.* Burnham, 8 Allen, 72 ; Commonwealth *v.* Roxbury, 9 Gray, 498.

[2] Cary *v.* Whitney, 48 Me. 526 ; Megerle *v.* Ashe, 27 Cal. 327 ; Kernan *v.* Griffith, 27 Cal. 89. See also Mayo *v.* Libby, 12 Mass. 339.

[3] Cary *v.* Whitney, *supra ;* Thorndike *v.* Richards, 13 Me. 430.

[4] Berry *v.* Raddin, 11 Allen, 577 ; West Roxbury *v.* Stoddard, 7 Allen, 158, 171.

[5] Ward *v.* Bartholomew, 6 Pick. 414.

[6] Baker *v.* Fales, 16 Mass. 497.

[7] Higbee *v.* Rice, 5 Mass. 350. See Hyman *v.* Read, 13 Cal. 444, 455 ; Ipswich Gram. Sch. Feoffees *v.* Andrews, 8 Met. 591.

that "heirs" should be inserted in the *habendum* of deeds, in order to carry a fee, grants by towns were excepted.[1]

§ 2043. **Public Grants in New England, continued.** — Probably, therefore, a very large proportion of the early estates in Massachusetts and Maine were held by no better title than a vote of the legislature, or that of proprietaries acting as ordinary corporations. Originally, it seems, it was supposed that this power of towns and other proprietaries to dispose of their lands by votes of majorities was intended only to apply to a partition of them into shares among themselves. But it soon grew to be a customary mode of making grants of lands to others, and the titles thus created have been recognized as valid by the courts.[2] But it is said by the court of New Hampshire, that "towns cannot now pass the title to real estate by a vote."[3] This doctrine of legislative grant has been adopted also in New Hampshire; and, in applying it, their court hold, that no particular terms are necessary to constitute a grant by the legislature; and, where they have fixed a particular line as the line of a township, the State is estopped to say that the title of the proprietors of the township does not extend to such line, and that a State may be estopped by the acts of its legislature.[4] In a case in Maine, Massachusetts, before their separation, in order to quiet the title of certain lands to the settlers in the town, authorized a committee to execute releases to these settlers respectively of the interest of the Commonwealth in the land. The occasion for doing this was, that the Commonwealth, while a Province, had granted the township, when, by the terms of the charter of 1692, it

[1] 4 Dane, Abr. 61.

[2] Rogers *v.* Goodwin, 2 Mass. 475, 477; Anc. Chart. 402, 403; Codman *v.* Winslow, 10 Mass. 146, 150; Adams *v.* Frothingham, 3 Mass. 352; Commonwealth *v.* Roxbury, 9 Gray, 479; Plymouth, Col. Laws, 29, 30, 198; Decker *v.* Freeman, 3 Me. 338; Pike *v.* Dyke, 2 Me. 213; Thomas *v.* Marshfield, 10 Pick. 367; Springfield *v.* Miller, 12 Mass. 417; Bachelder *v.* Wakefield, 8 Cush. 247; Green *v.* Putnam, id. 25; Shrewsbury First Par. *v.* Smith, 14 Pick. 297; Higbee *v.* Rice, 5 Mass. 350; Gloucester *v.* Gaffney, 8 Allen, 11; Cary *v.* Whitney, 48 Me. 526. And a vote of proprietors authorizing a committee to sell lands empowers the committee to make deeds in the name of the proprietors. Thorndike *v.* Barrett, 3 Me. 380.

[3] Cofran *v.* Cockran, 5 N. H. 461.

[4] Enfield *v.* Permit, 5 N. H. 280.

was necessary for the king to approve of the grant in order to its validity. This had never been done; and consequently nothing had passed by such former grant, and, as successors to the Province, the Commonwealth might claim the land. Nor was the State disseised, though there were persons in possession of the lands claiming them. The committee, instead of executing a deed of release, made one by which the interest of the State was granted, sold, and quitclaimed; and a question arose, whether this was a valid exercise of the power delegated to them. But it was held that the deed, as given, might be construed as a deed of release, and that it was competent for the Commonwealth, in the exercise of its legislative power, to prescribe any form they might deem expedient, and that the same would be effectual, though, if used by an individual or a corporation, it would have been inoperative.[1] And in a similar case it was held, that, whether the deed was in proper form or not, the resolve itself, authorizing the release to be made, was itself virtually a grant.[2] In closing this subject, it is only necessary to add, that it was always competent for the State or proprietaries to make grants by means of deeds executed by agents or committees chosen and appointed for that purpose, and that such is the mode which has been adopted for many years in disposing of the public lands.[3]

[1] Hill *v.* Dyer, 3 Me. 441.

[2] Sargent *v.* Simpson, 8 Me. 148. See Lambert *v.* Carr, 9 Mass. 185.

[3] See Church *v.* Gilman, 15 Wend. 656. And such deed must be proved to have been delivered as any other deed. Hulick *v.* Scovil, 9 Ill. 174.

CHAPTER XCVI.

TITLE BY OFFICE GRANT.

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2079. Deed cannot be impeached for mere irregularity.
2080. Sheriff's return conclusive.

§ 2044. **What Conveyances are included in this Term.** — There are several modes and forms of divesting the title of one owner to lands, and creating a title to the same in another,

which derive their force and effect from statute provisions, whereby conveyances are made by some officer of the law to effect certain purposes where the owner is either unwilling or unable to execute the requisite deeds to pass the title. Among these are levies or sales to satisfy execution creditors; sales by order or decree of a court of chancery; sales by orders or licenses of courts, or by special acts of the legislature, for the payment of the debts of persons deceased, or the investment of funds for infants, and the like; and sales made under the provisions of the statutes of the several States for the enforcement of the payment of taxes, or of special liens thereon. To carry the purposes of such levy or sale into effect implies the execution of a statute power, varying according to the subject-matter upon which it is exercised.

§ 2045. **Execution Sales.** — If the land of a debtor, not exempt from forced sale under the homestead laws, be appropriated by act of law to the payment of a judgment creditor, the title thereby acquired is, to all intents, as valid and effectual, with few if any exceptions, as if it had been conveyed by the debtor himself by a deed in the proper and requisite form. It is the policy of the law, in all the States, to give to creditors a right to avail themselves of the property of their debtors, with certain limitations and restrictions, and which is to apply as well to the case of deceased as living debtors; and the law, accordingly, provides means for carrying out this policy.[1] If property be sold upon execution issued upon a judgment regularly rendered by a court having jurisdiction of the parties and matter at interest, such sale will pass a good and indefeasible

[1] In all the States the legal interest of every judgment debtor in real estate may be seized and levied on execution; as well as in most of them, his equitable title. This remedy was unknown at the common law, and its existence depends in all cases upon positive statutes. The remedy given by the English law, however, by the writ of *elegit*, is still in use in Virginia and Delaware. In most of the States a lien is created on the real estate of the debtor by the rendition or docketing of a judgment or final decree. There is a great diversity of practice in the different States in the method of levying execution upon real estate. In some of the States, moreover, the officer is required to divide the property, if susceptible of division, and sell only so much as will be sufficient to satisfy the execution in absence of any election by the debtor. In several of the States where land is sold on execution, the debtor is allowed a certain time after the levy, in which he may redeem the land by payment of the purchase-money and a specified rate of interest. See 4 Kent, Com. 428 *et seq.*

title, although the judgment may subsequently be reversed.[1] In selling a debtor's equity of redemption upon execution, the sheriff acts in place of the debtor, and cannot therefore sell it to debtor's wife, any more than the debtor himself could.[2]

§ 2046. **Execution Sales, when void.** — [An execution sale is a sale under a power. The judgment and execution furnish the power. If the judgment is void, it is no judgment, and, consequently, there is no power. Under such circumstances, as the officer has no estate in the land to convey, and no power to make a conveyance, the purchaser can acquire no estate. The validity of the judgment depends upon the jurisdiction of the court over the subject-matter and the parties. If either is lacking, the judgment is void.[3] But if the court had jurisdiction of the subject-matter and of the parties, then no irregularities of the officer between the delivery to him of the execution, and the execution of the deed, will render the deed void.[4] *A fortiori*, errors in the judgment which are not jurisdictional will not affect the sale.[5] But although the sale may be valid, the deed may be void, as for defective execution. This may be taken advantage of collaterally.[6] And in some States a sheriff's deed is made *prima facie* evidence of its own validity, or of the truth of its recitals.[7]]

§ 2047. **Executors' and Administrators' Sales.** — In case of persons dying intestate, provision is made whereby courts are authorized to empower their administrators to sell and convey the lands of the deceased, and thereby to pass a good title to

[1] Gordon *v.* Canal Co., 17 Am. Law Reg. 282; Gray *v.* Brignardello, 1 Wall. 627; Parker *v.* Anderson, 5 T. B. Mon. 445, where the sale was made under a decree of a court of chancery. But a sale by a sheriff, of land not belonging to the judgment debtor, gives no title or right of entry to the purchaser. Smith *v.* Steele, 17 Penn. St. 30. A sale on execution relates back to the time when the judgment became a lien, cutting off intermediate interests. Fell *v.* Price, 8 Ill. 190. See Boyd *v.* Longworth, 11 Ohio, 252; Alexander *v.* Merry, 9 Mo. 514.

[2] Stetson *v.* O'Sullivan, 8 Allen, 321.

[3] Bernhardt *v.* Brown, 119 N. C. 506; s. c. 26 S. E. Rep. 162; s. c. 36 L. R. A. 402.

[4] Rorer on Judicial Sales, § 836. The validity of the sale cannot be impeached collaterally even by showing that the judgment has been satisfied. Nichols *v.* Disner, 5 Dutch. 293.

[5] Lovitt *v.* Russell, 138 Mo. 474; s. c. 40 S. W. Rep. 123.

[6] Frazier *v.* Steenrod, 7 Iowa, 346.

[7] Kansas, Laws 1899, p. 190; Virginia, Laws 1897–98, p. 322.

the same. The same is true in respect to testate estates of persons indebted, whose executors are not empowered by their wills to make sale of their lands.

§ 2048. **Executors' and Administrators' Sales, continued.** — In these cases, as the executor or administrator acts solely under a power conferred by statute, he must, in order to render the sale effectual, comply with the various requirements of the statute; and, regularly, the deed by which it is attempted to pass the title to a purchaser should show, upon its face, a recital of the steps which have been taken in consummating the sale, as well as a statement of the authority by which it is executed; though it would, probably, be sufficient if the deed in any part of it showed the capacity in which, and the power under which, the person executing it acted in making the conveyance.[1] If a will, under which an executor acts, authorizes him to sell testator's lands, there is no need of a surrogate's order to make his sale effectual.[2] But in order to the receiving of an executor's deed as valid and effectual, it must be shown, preliminary thereto, that the statutory requirements have been complied with, or that an express power was given in the will under which he acts.[3] There are cases where the law will presume that an act required by law to be done is done, as where it is imposed upon one as a duty, and a failure to perform the act would make him guilty of a criminal neglect of such duty. So the regularity of official proceedings will often be presumed after a long lapse of time. Thirty years have been held sufficient.[4]

§ 2049. **Sales under Order of Court — Jurisdiction.** — [In all

[1] Kingsbury *v.* Wild, 3 N. H. 30; Griswold *v.* Bigelow, 6 Conn. 258; Lockwood *v.* Sturdevant, 6 Conn. 373; Planters' Bank *v.* Johnson, 7 Sm. & M. 449; Campbell *v.* Knights, 26 Me. 224; Jarvis *v.* Russick, 12 Mo. 63; Worthy *v.* Johnson, 8 Ga. 236; Sheldon *v.* Wright, 5 N. Y. 497; Jones *v.* Taylor, 7 Tex. 240; Doolittle *v.* Holton, 28 Vt. 819; Longworth *v.* Bank of United States, 6 Ohio, 536. If land is regularly sold on execution, a reversal of the judgment afterwards will not divest the title of the purchaser. Feger *v.* Keefer, 6 Watts, 297.

[2] Payne *v.* Payne, 18 Cal. 291.

[3] White *v.* Moses, 21 Cal. 44.

[4] Williams *v.* East India Co., 3 East, 192, and cases illustrating this on pp. 199, 200; Hartwell *v.* Root, 19 Johns. 347; King *v.* Hawkins, 10 East, 211; 1 Greenl. Ev. § 80; id. § 20.

cases where the statutes permit the court to order a sale to be made of the property of a decedent, or ward, the authority of the court is dependent upon the existence of certain facts, which are jurisdictional, and without which any order of sale is void, and a purchaser thereunder will acquire no title. These jurisdictional facts must appear on the face of the record of the proceedings to secure the sale; if the purchaser's title is collaterally called in question he cannot supplement the record by proof of the existence of the jurisdictional facts. The record itself is conclusive for or against the jurisdiction of the court.[1] Thus, where the statute empowers the probate court to order the lands of a decedent to be sold for the payment of debts "*after exhaustion of personal assets*," the exhaustion of the personal assets is a jurisdictional fact, and the failure of the record to disclose it will be fatal to the order of sale, and the purchaser's title will be open to collateral attack.[2]]

§ 2050. **Of Legislative Power to transfer Private Titles.** — Questions arise as to the power of the legislature, by special laws, to authorize sales or to ratify imperfect sales made by persons acting officially, or to transfer the title of lands from one person to another, such as the special act, in one case, where an executor of a will, made and proved in New Hampshire, sold lands in Rhode Island, without authority, to pay debts of the deceased, and the title was confirmed by the legislature of Rhode Island.[3] This opens an interesting inquiry upon a subject which has often been before the courts, but upon which their decisions have not been uniform. It is not proposed to consider these decisions in detail; and it may be remarked, that very little aid in furnishing a guide by which to determine the questions involved can be derived from the action of the British Parliament, to whose power there is no such limitation as is provided in the American constitutions, and the checks which

[1] Beauregard *v.* New Orleans, 18 How. 497; Satcher *v.* Satcher, 41 Ala. 26; Hays *v.* McNealy, 16 Fla. 409; Elliott *v.* Piersoll, 1 Pet. 340.

[2] Hays *v.* McNealy, *supra*.

[3] Wilkinson *v.* Leland, 2 Pet. 627; s. c. 10 Pet. 294. But see Jones *v.* Perry, 10 Yerg. 59; Lane *v.* Dorman, 4 Ill. 238; Blackw. Tax Titles, 30, 31; Bott *v.* Perley, 11 Mass. 169, 174. See also Price *v.* Huey, 22 Ind. 25; Florentine *v.* Barton, 2 Wall. 210.

courts are thereby authorized to interpose to the action of the legislature. As a general proposition, a legislature may do anything not inhibited by the constitution. Beyond that it is omnipotent.[1] But a law so passed as to depend upon a vote of the people whether it shall take effect or not, if it be a general one, is not a valid act of legislation.[2] The government has a right to provide the mode in which existing rights may be forfeited; but it cannot transfer or deprive the citizen of them, except for an offence against the laws of the government.[3] A legislature cannot pass a retrospective act which shall impair vested rights. But this does not apply to remedial statutes, provided they do not impair contracts, but only go to confirm rights already existing, or provide a remedy to cure defects.[4] Thus a statute giving validity to deeds made by married women, defectively executed, was held good.[5] In respect to the right to take private property, by the exercise of what is called eminent domain in the State, there is little that needs to be said. It can only be done for public uses, and that upon making a just compensation to the owner for the same. To that extent, it is a power inherent in the sovereignty of every State, and is based upon the idea that private interests must yield to public necessity.[6] The only restriction upon this power is, that it should provide for compensation being made.[7] But no one but the owner can object that provision has not been made to satisfy the party whose property has been taken; and if he assents to it, no other one can object.[8] But this power does not imply any right on the part of the State to take the property of one

[1] Chicago *v.* Larned, 34 Ill. 280; Clarke *v.* Rochester, 24 Barb. 470, 480, 489; Wellington, Pet'rs, etc., 16 Pick. 95; Merrill *v.* Sherburne, 1 N. H. 199.

[2] Clarke *v.* Rochester, *supra;* Barto *v.* Himrod, 8 N. Y. 483.

[3] Russell *v.* Rumsey, 35 Ill. 374.

[4] Dentzel *v.* Waldie, 30 Cal. 144; 1 Kent, Com. 455.

[5] Chesnut *v.* Shane, 16 Ohio, 599; Mercer *v.* Watson, 1 Watts, 355; Watson *v.* Mercer, 8 Pet. 108; Tate *v.* Stooltzfoos, 16 Serg. & R. 35.

[6] See Homochitto Riv. Comm'rs *v.* Withers, 29 Miss. 21, as to appropriating waters of public streams, etc., for public use; Heyward *v.* New York, 7 N. Y. 324; Taylor *v.* Porter, 4 Hill, 143; Buffalo & N. Y. R. R. Co. *v.* Brainard, 9 N. Y. 108; Carson *v.* Coleman, 11 N. J. Eq. 108; Chicago *v.* Larned, 34 Ill. 276; Clarke *v.* Rochester, 24 Barb. 481; Moale *v.* Baltimore, 5 Md. 314.

[7] E. Tenn. & Va. R. R. Co. *v.* Love, 3 Head, 64.

[8] Haskell *v.* New Bedford, 108 Mass. 214.

citizen and give it to another, whether with or without compensation.[1] An act taking the estate of A, and giving it to B, was held void, though passed while the State was a Colony.[2] This power can be exercised by the direct action of the legislature, or by creating corporations with authority to take lands where it is for a public use, like the construction of railroads, canals, and like public works.[3]

§ 2051. **Illustrations.** — Among the decisions bearing upon the foregoing propositions, the following may be mentioned: Towns cannot lay out ways for the private use of individuals over the lands of others;[4] a State cannot deprive a joint-tenant of his right of survivorship by an act passed after such right has vested;[5] nor can a State take private land for a lighthouse, since that belongs to the United States alone, who alone have the power to take it for such purposes. All that a State can do in such cases is, to cede jurisdiction to the United States over the land taken.[6] But a State may authorize the United States to exercise the right of eminent domain by taking land for the site of a post-office and treasury.[7] So it may authorize a public corporation, like one to construct a canal, created by the government of another State, to take lands for the use of such corporation.[8]

§ 2052. **Legislative Power, how tested.** — In attempting to define the cases in which a legislature may, by special act,

[1] Varick *v.* Smith, 5 Paige, 159; Arrowsmith *v.* Burlingim, 4 McLean, C. C. 495; Powers *v.* Bergen, 6 N. Y. 358; People *v.* Brooklyn, 4 N. Y. 422; Commonwealth *v.* Alger, 7 Cush. 53, 85; Gillan *v.* Hutchinson, 16 Cal. 156; Adams *v.* Palmer, 51 Me. 494, 495.

[2] Bowman *v.* Middleton, 1 Bay, 252; Den d. Bayard *v.* Singleton, Martin (N. C.), 49; Quincy, Rep. 529, 530, note, and cases cited.

[3] Buffalo R. R. *v.* Brainard, 9 N. Y. 100; Bloodgood *v.* Mohawk & H. R. R. Co., 18 Wend. 9; Hooker *v.* N. H. & N. Co., 14 Conn. 146; Cushman *v.* Smith, 34 Me. 247, where the point is examined, how far this can be lawfully exercised before payment or provision for ascertaining and payment of damages shall have been made. See also the cases there collected.

[4] Flagg *v.* Flagg, 16 Gray, 180; Wild *v.* Deig, 43 Ind. 455; *vide* 13 Am. Rep. 404, note.

[5] Greer *v.* Blanchar, 40 Cal. 198.

[6] People *v.* Humphrey, 23 Mich. 471; Burt *v.* Merchants' Ins. Co., 106 Mass. 360.

[7] Burt *v.* Merchants' Ins. Co., 106 Mass. 356, 363; Reddall *v.* Bryan, 14 Md. 444; Gilmer *v.* Lime Point, 18 Cal. 229. See Orr *v.* Quimby, 54 N. H. 590.

[8] *Re* Townsend, 39 N. Y. 171.

change the ownership of land, or authorize one man to transfer the interest of another in lands, there are certain principles which may be regarded as elementary, which will serve as tests to be applied to the questions as they arise. And, in the first place, the power to do this does not depend upon its being by a general law or special act.[1] In the next place, wherever the act is based upon the assumption or exercise of judicial power, it is void, since legislatures are prohibited from the exercise of such powers.[2] In the next place, a legislative act cannot authorize the property of a citizen to be taken from him through the instrumentality of a sale or otherwise, so long as he is under no legal disability to manage his own affairs, where the effect is, not to convert it to the use of the government, but to transfer it from the original owner to a third person. The cases under this head are numerous and the proposition can be best illustrated by referring to some of them. The language of Story, J., in Wilkinson *v.* Leland,[3] is, "We know no case in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power in any State of the Union." So an act compelling the owner of a ground rent irredeemable to accept from the ground owner a sum of money in extinction thereof is void, as being unconstitutional.[4] Bronson, J., in Taylor *v.* Porter, above cited,[5] says: "When a man wants the property of another, I mean to say that the legislature cannot help him in making the acquisition." And the language of the court of Ohio, in one case, was, "The legislature may cure the title to property, but cannot create it."[6] In New York, the legislature, by a special act, discontinued an ancient street in a city, and gave the soil of it to the city. It was held void so far as it undertook to dispose of the soil, as that belonged to private persons.[7] So the court

[1] Edwards *v.* Pope, 4 Ill. 473; Kibby *v.* Chitwood, 4 Mon. 95; Sohier *v.* Mass. Gen. Hosp., 3 Cush. 483.

[2] Edwards *v.* Pope, *supra;* Lane *v.* Dorman, 4 Ill. 238; Rice *v.* Parkman, 16 Mass. 326; Jones *v.* Perry, 10 Yerg. 59.

[3] 2 Pet. 658; Heyward *v.* Mayor, 7 N. Y. 324; Adams *v.* Palmer, 51 Me. 494.

[4] Palairet's Appeal, 67 Penn. St. 479.

[5] 4 Hill, 147.

[6] Good *v.* Zercher, 12 Ohio, 368.

[7] *Re* Albany Street, 11 Wend. 149, 152; John and Cherry Streets, 19 Wend. 676.

of Pennsylvania took the distinction above alluded to between the act of the legislature affecting lands whose owner is under a disability, and one where he is not. Thus, in one case, lands had been given to trustees to be held during the life of a son, for his support, and, after his death, to be divided among heirs; and an act of the legislature authorized the sale of this land, and the investing the proceeds to the same uses as the land itself was held; but the reversioners, having been adults at the time of this being done, objected to the sale, and it was held to be void.[1] So in Massachusetts, where devisees for life sold the land in fee, and the legislature by special act confirmed the title, it was held void as to the reversioners, in depriving them of their estate without their consent, and without compensation made.[2] And where a testator signed a wrong paper as his last will, under a mistake, it was held that it was not competent for the legislature to authorize the courts to try the question, and reform his will, since it would be divesting his legal heirs of the estate which had, in the mean time, descended to them.[3] In Illinois, a special act authorizing J. L. to sell the land of a deceased person, and out of the proceeds to pay himself and J. B. a certain sum advanced by them on account of the estate, was held to be unconstitutional and void: 1st. Because the legislature was not a competent body to determine what sum was due; and 2d. Because the sale was not for the benefit of the general creditors of the estate, but for a part only of them.[4] The case of Powers *v.* Bergen was, in some respects, like those above mentioned. In that case there was a special act authorizing executors to sell lands in fee, the use of which was given to certain tenants for life, with a remainder over, and held to be void, as it was authorizing the sale of one man's estate to another, without any agency on the part of the owner, or any reasons given for creating the power. The court say: "If the legislature should pass an act to take private property for a purpose not of a public nature, as if it should provide, through certain forms to be observed, to take the property of one and give or sell it,

[1] Ervine's App., 16 Penn. St. 256.
[2] Sohier *v.* Mass. Gen. Hosp., 3 Cush. 483, 492.
[3] Alter's App., 67 Penn. St. 341.
[4] Lane *v.* Dorman, 4 Ill. 238.

which is the same thing in principle, to another, the law would be clearly unconstitutional and void." [1]

§ 2053. **Legislative Act valid in Three Cases.** — The cases in which it has been held that a legislative act may avail in creating a good title to land seem to be of three classes, and the authority to pass such acts seems to be limited to these: 1st. In confirming a title, where the proceedings or sale, by which it has been attempted to convey land, have proved to be defective or incomplete for informality; 2d. Where the owners of the land to be conveyed have been under a disability, like that of infancy, lunacy, or the like, where the State acts as a kind of *parens patriæ* in taking care of the property of its subjects incapable of managing their own affairs; 3d. Where the sale is made for the purpose of satisfying the debts of a person deceased. Among the cases under the first class was an act confirming the title to lands, the deed to which was defective in form, by reason of the acknowledgment of the wife not having been properly certified.[2] But a legislative act cannot make a defective tax-title good.[3] In another case, where commissioners, in order to make partition of lands, were authorized to sell them, but instead of making deeds to the purchasers, as they should have done, made them to others, who had purchased of the first purchasers, an act confirmatory of the title was held valid.[4] In another, an executor, under a license of court to sell lands, omitted to publish notice of his petition for leave to sell, and the legislature confirmed the title to lands sold by him, the children of the testator having assented to the sale.[5] But where the devise was of real estate to a charity, with power in the managers to rent, but not to sell, it was held that the legislature could not empower these managers to sell the land, and convert it into money.[6]

[1] 6 N. Y. 358. See also Chesnut *v.* Shane, 16 Ohio, 599; Jackson d. Gratz *v.* Catlin, 2 Johns. 263.

[2] Watson *v.* Mercer, 8 Pet. 88; Chesnut *v.* Shane, 16 Ohio, 599; *contra*, Good *v.* Zercher, 12 Ohio, 364; Adams *v.* Palmer, 51 Me. 494.

[3] Conway *v.* Cable, 37 Ill. 82, 90.

[4] Kearney *v.* Taylor, 15 How. 494.

[5] Sohier *v.* Mass. Gen. Hosp., 3 Cush. 483.

[6] Tharp *v.* Fleming, 1 Houst. 592.

§ 2054. **Power of the State over Property of Infants, Lunatics, etc.** — The second class is much more comprehensive in the subjects to which it applies; and the law, in respect to them, rests upon the general idea that the State is bound to take care of the interests of its citizens who are incapacitated to act for themselves; and, for that purpose, powers adequate are delegated to the legislature.[1] Among the cases illustrative of this is one put in Sohier *v.* Massachusetts General Hospital, above cited, where an act authorized the sale of land of which there was a life-estate, with a reversion in persons who could not be ascertained, but were represented by trustees. It was not, in fact, depriving a party of his property, but authorizing a change in its form. So in Rice *v.* Parkman, cited also, the act authorized a father to sell the land of his minor children, and convert the same into money for investment. "This power," say the court, "must rest in the legislature of this Commonwealth, that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves."[2] And in Sohier *v.* Massachusetts General Hospital, the court say, it goes upon the necessity of the legislature having the power to authorize the sale of estates of infants, idiots, insane persons, and persons not known or not in being, who cannot act for themselves. In such cases, the legislature, as *parens patriæ*, can disentangle and unfetter the estates by authorizing a sale, taking precaution that the substantial rights of all are protected and secured.[3] In Davison *v.* Johonnot, the act authorized a guardian of an insane person to sell his land, and the court sustained it, as being the exercise of a proper *tutorial* power in such cases, although one purpose of making the sale was to raise money to pay off an incumbrance upon another part of the ward's estate.[4] In Doe d. Chandler *v.* Douglass, the act authorized an administrator of an intestate estate to sell the real estate of the deceased

[1] Sohier *v.* Mass. Gen. Hosp., 3 Cush. 483, 497; Rice *v.* Parkman, 16 Mass. 326; Davison *v.* Johonnot, 7 Met. 395; Estep *v.* Hutchman, 14 Serg. & R. 435, 438; Clarke *v.* Van Surlay, 15 Wend. 436, 445; Powers *v.* Bergen, 6 N. Y. 358, 366; Clarke *v.* Hayes, 9 Gray, 426.

[2] 16 Mass. 326, 329. See Blagge *v.* Miles, 1 Story, 426.

[3] 3 Cush. 483, 497.

[4] 7 Met. 395.

upon such terms as he should deem most advantageous, the proceeds of the sale to be in his hands, to be disposed of according to law, the heirs of the intestate being minor children.[1] In another case, the act gave a guardian of a minor authority to sell his ward's lands for his maintenance and education.[2] And in still another, it authorized a guardian of minors to convey their estate to a particular person to whom their father had bargained it in his lifetime.[3] The doctrine of some of the above cases is controverted by Green, J., in Jones *v.* Perry;[4] while the court, in Rice *v.* Parkman, held that it was no objection to the legislature acting specially upon these cases, that they had delegated a like power to tribunals which were created by a general law.[5]

§ 2055. **Disposal of Private Estates by Special Act.** — The third class of legislative powers in respect to the disposal of private estates by special acts rests upon the idea, that, upon the decease of a debtor leaving property, his creditors have a paramount claim to so much of it as is necessary to satisfy their debts; and that an act of legislation which accomplishes this idea will be valid, though the form in which it is done may vary from the general law. The leading case upon this part of the subject is that of Wilkinson *v.* Leland, where an executor, appointed in New Hampshire, sold land in Rhode Island, without having the will approved there, for the payment of the debts of the testator. After this, the legislature of Rhode Island, by a special act, confirmed the sale. It was held to make a good title, although utterly void until thus confirmed.[6] In another case, the act authorized one of two administrators to convey the land of the intestate directly to his creditors, they taking the same at twenty-five per cent discount from the appraised value thereof. The act was permissive, and not compulsory.[7] In Kentucky, the validity of acts has been sustained by which the lands of a deceased debtor

[1] 8 Blackf. 10.

[2] Cochran *v.* Van Surlay, 20 Wend. 365; s. c. 15 Wend. 436, 445.

[3] Estep *v.* Hutchman, 14 Serg. & R. 435.

[4] 10 Yerg. 59.

[5] Kibby *v.* Chitwood, 4 T. B. Mon. 95; Shehan *v.* Barnett, 6 T. B. Mon. 594.

[6] 2 Pet. 627.

[7] Langdon *v.* Strong, 2 Vt. 234.

were sold for the payment of his debts, although the mode of doing it was variant from that required by the general statute upon the subject.[1] So in Alabama, an act authorizing an administratrix of an intestate debtor, who died there, to sell his lands for the payment of his debts, either by herself or her attorney, was held good, and a sale made by her attorney valid, although she was a resident in Massachusetts.[2]

§ 2056. **Judicial Sales.** — Sales under and by virtue of decrees of courts of chancery stand upon somewhat different ground. The subject is treated of, in its practical application, in Mr. Daniell's Chancery Practice. Such sales are usually made through the agency of a master, who ordinarily is required to make the sale by public auction to the highest bidder, but sometimes is authorized to do it by private contract. But the duty of the master seems to be merely to make the contract. He then reports his proceedings to the court, who thereupon require of the parties to execute the proper deeds; the master being a kind of agent to bring about, by means of the court, a conveyance by deed from the vendor to the purchaser.[3] But the powers and duties of courts of chancery, in the matter of making sales in the several States, will be found to be very various. Such are the authorizing of sales of mortgaged estates for purposes of foreclosure,[4] or to satisfy a vendor's lien,[5] the appointment of special trustees to sell the estate of deceased persons for payment of their debts,[6] and the like; in all which cases, it is believed, courts empower the trustee, commissioner, or master, as he may be named, to make the sale and execute the deed, in most if not all respects in like manner as these are done in making sales by sheriffs or other officers. The deeds, in such case, ought regularly to show the grounds and purposes of sale, and the authority by

[1] Kibby *v.* Chitwood, 4 T. B. Mon. 95; Shehan *v.* Barnett, 6 T. B. Mon. 594.

[2] Watkins *v.* Holman, 16 Pet. 59. Upon the point of granting to trustees of churches, cemeteries, etc., leave to sell the same, see Sohier *v.* Trinity Church, 109 Mass. 1–23.

[3] Daniel, Chanc. Pract. 1447, 1459.

[4] Kershaw *v.* Thompson, 4 Johns. Ch. 609; Creighton *v.* Paine, 2 Ala. 158. See Denning *v.* Smith, 3 Johns. Ch. 344.

[5] Jones *v.* Froman, 6 T. B. Mon. 127.

[6] Shriver *v.* Lynn, 2 How. 57, 58.

which the act is done.[1] But where a trustee was authorized to sell trust-property if he deemed it necessary, and he conveyed it by a deed wherein he was neither named as trustee, nor was there any recital of a sale being deemed necessary, it was held to be a valid and effectual deed.[2] A sale by a master is a judicial sale, and binds all the parties to the suit who have right or claim.[3] And where the sale is made under a decree of a court of equity, it is competent for the court to put the purchaser in possession. Such would be the case where a sale of the premises is made to foreclose a mortgage.[4]

§ 2057. **Purchaser's Title upon Decree reversed.** — In some cases, if the judgment under which a judicial sale has been had is reversed, the title acquired by a purchaser at such sale will fail; as where such judgment was reversed for irregularity in the proceedings upon which it was rendered, and the purchaser, at a sale under it, was the attorney in the suit, it was held that he must be taken to have purchased with a knowledge of the defects in the proceedings, and his title was avoided by such reversal.[5] The same rule would apply if the plaintiff in the original suit had been the purchaser; but if, in such sale, the purchaser is a stranger without notice, and he has paid the purchase-money for a legal estate, and has an officer's deed for the same, his title would not be affected by a reversal of the judgment under which the sale is made.[6] The same rule applies in Missouri, and extends to protect a title gained under such sale by a person, *bona fide*, who is a stranger to the proceedings upon which the reversal rests; and a similar doctrine prevails in Illinois.[7] But in Massachusetts, if a judgment is reversed which has been satisfied by a levy on the debtor's land, he may recover it with the rents and

[1] Wood *v.* Man, 3 Sumn. C. C. 318; Tooley *v.* Kane, 1 Sm. & M. Ch. 518; Atkins *v.* Kinnan, 20 Wend. 241.

[2] Hamilton *v.* Crosby, 32 Conn. 347.

[3] Sands *v.* Codwise, 4 Johns. 602.

[4] Kershaw *v.* Thompson, 4 Johns. Ch. 609; Schenck *v.* Conover, 13 N. J. Eq. 220.

[5] Galpin *v.* Page, 18 Wall. 350, 373.

[6] Reynolds *v.* Harris, 14 Cal. 667, 680.

[7] Gott *v.* Powell, 41 Mo. 416; McJilton *v.* Love, 13 Ill. 495; Jackson d. Saunders *v.* Cadwell, 1 Cowen, 641.

profits in a writ of entry against the levy creditor, or such creditor's grantee.[1]

§ 2058. **Effect of Decree before Deed made.** — A decree for a conveyance does not operate as a conveyance.[2] It has no effect upon the position of the parties in respect to the land until it has been executed.[3] But a deed made to carry out a sale under a decree in chancery is evidence of title in the grantee against all the world.[4] If the deed be not executed within the time limited, it still operates as a conveyance, subject, as between the parties, to have the title revert if the decree is reversed ; but if the decree is executed in good faith, a reversal of it will not divest the title of the purchaser.[5]

§ 2059. **Sales under Mechanics' Lien Laws.** — There is another class of sales and conveyances of real estate unknown to the common law, provided for by the statutes of many of the States, whereby a mechanic who does labor, or furnishes materials in erecting buildings, on lands, acquires a lien upon the buildings, and the land on which they stand, by virtue of which, upon judicial proceedings had, courts are authorized to cause the same to be sold by an officer duly empowered, who, upon sale made, executes a deed or deeds thereof to the purchaser. Laws of a similar character exist in a majority of the States ; but their nature and effect may be illustrated by the statute of a single State. Thus, in Massachusetts, the statute provides for filing a statement of the lien which is claimed in the clerk's office of the town or city, and for commencing a suit for enforcing the same, and for a joinder therein of the several persons having liens on the same building. The court are to ascertain the amounts due, and thereupon to order a sale of the property to be made by any officer authorized to serve civil process. The mode of proceeding in making such sale is prescribed and pointed out, and how the proceeds are to be distributed and applied, giving the debtor a right to redeem the estate from such sale within certain limits as to time. It will be perceived that the lien here spoken of is itself no title to

[1] Delano *v.* Wilde, 11 Gray, 17.
[2] Ryder *v.* Innerarity, 4 Stew. & P. 14.
[3] Shepherd *v.* Ross Co. Comm'rs, 7 Ohio, 271.
[4] Mummy *v.* Johnston, 3 A. K. Marsh. 220.
[5] Taylor *v.* Boyd, 3 Ohio, 337.

the land, but merely furnishes the basis for proceedings, under which, by means of a statute power, a title is created in whoever becomes the purchaser of such estate.[1]

§ 2060. **The Power of Taxation*** is inherent in the very existence of government, like that of eminent domain, whereby the property of the citizen may be taken for public uses. But both are limited, and can only be exercised on the principle of equality and uniformity.[2] But it is unlike the latter power, since it does not consist in taking the property of one, and making him compensation therefor, out of the general property of the body politic, but in taking from each and all the citizens a proportionate sum for defraying the expenses incident to government. It is a power always incident to sovereignty, essential to the maintenance of government, and operates on all the persons and property belonging to the body politic.[3] Nor would this right be restricted in respect to land of which the State itself had granted the title to the party who is taxed; for it has its foundations in society itself, and what shall be the portion which any individual shall contribute to the public burdens is to be determined by the legislature alone.[4]

§ 2061. **Power to sell for Taxes purely Statutory.** — It is to the statute law alone that reference must be had for the power of selling lands for the non-payment of taxes assessed upon them, since it is neither a common law nor civil law remedy or principle.[5]

§ 2062. **What must be shown to support Tax-deed.** — This power to sell lands for the payment of taxes is a naked one, not coupled with any interest in the land in the officer who effects it; and in order that the deed which he executes should

* Note. — The work of Mr. Blackwell, of the Illinois Bar, on the subject of Tax Titles, is so exhaustive that it has been freely used in the preparation of what is here collected.

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[1] 2 Kent, Com. 828 (8th ed.), note; Mass. Gen. Stat. c. 150; Clark *v.* Kingsley, 8 Allen, 543.

[2] Chicago *v.* Larned, 34 Ill. 279.

[3] Blackw. Tax Titles, 8; Providence Bank *v.* Billings, 4 Pet. 561; Doe d. Gladney *v.* Deavors, 11 Ga. 79; M'Culloch *v.* Maryland, 4 Wheat. 428; People *v.* Brooklyn, 4 N. Y. 422, 424; Clarke *v.* Rochester, 24 Barb. 482, 484, 489; Moale *v.* Baltimore, 5 Md. 314.

[4] Providence Bank *v.* Billings, 4 Pet. 563; Blackw. Tax Titles, 37.

[5] Blackw. Tax Titles, 39.

give even a *prima facie* evidence of title, unless a different effect is given to it by statute, it is necessary to show, affirmatively, that the prerequisites required by law have been complied with. As the collector has a power to sell only in particular cases described in the act, it must appear that such a case has arisen to authorize the exercise of the power. Indeed, it is required as a condition precedent to passing a good title by such a sale, that all the proceedings of the several officers who have any act to do preliminary to such sale, such as *listing*, and valuation of the land, laying or collecting the tax, advertising and selling the land, the making of proper returns, and the filing or recording of the proceedings, whether the acts are to be performed before or after the sale, must be shown to have been done in strict compliance with the statute authorizing the sale.[1] And the proof of the regularity of these several proceedings devolves upon the person who claims title under the collector's sale.[2] Such sales are not regarded as judicial sales, nor are the presumptions which exist in favor of the latter extended to sales by collectors.[3]

§ 2063. **Effect of Recitals in Tax-deed.** — Consequently, the recitals in a tax-deed or deed of an officer are not evidence against the owner of the property. The facts recited must be proved by evidence *aliunde*. Nor is the formal conveyance itself even *prima facie* evidence that the officers of the law, upon the regularity of whose acts its validity depends, have complied with the requisite forms in their proceedings.[4] The only exception is where the deed is an ancient one accompanied by long possession.[5] To make a good tax-title, the one claiming under it must show the authority by which it was granted, and

[1] Williams *v.* Peyton, 4 Wheat. 78, 79 ; Ronkendorff *v.* Taylor, 4 Pet. 349 ; Morton *v.* Reeds, 6 Mo. 64 ; Blackw. Tax Titles, 47, and cases cited ; Thatcher *v.* Powell, 6 Wheat. 119 ; Alvord *v.* Collin, 20 Pick. 418, 421 ; Minor *v.* Natchez, 4 Sm. & M. 627 ; Jackson d. Cook *v.* Shepard, 7 Cow. 88 ; Weyand *v.* Tipton, 5 S. & R. 332 ; Harrington *v.* Worcester, 6 Allen, 576 ; Abell *v.* Cross, 17 Iowa, 176 ; Conway *v.* Cable, 37 Ill. 88.

[2] Ronkendorff *v.* Taylor, 4 Pet. 349.

[3] Beatty *v.* Mason, 30 Md. 409.

[4] Blackw. Tax Titles, 93, 94, 104, and cases cited ; Jackson d. Cook *v.* Shepard, 7 Cow. 88 ; Weyand *v.* Tipton, 5 Serg. & R. 332.

[5] Worthing *v.* Webster, 45 Me. 270 ; Ferris *v.* Coover, 10 Cal. 589 ; Kelsey *v.* Abbott, 13 Cal. 609.

the proceedings of the officer are to be construed strictly. Parol evidence is not admitted to explain a latent ambiguity in the description of the granted premises, or to locate the land; and if the description by the officer be not so certain and complete as not to require the aid of extrinsic evidence, the deed will be inoperative.[1] This principle of the common law, however, is modified by the statutes of several of the States so far as to give to the deed of a collector the effect of *prima facie* evidence of title.

§ 2064. **Purchaser charged with Notice of Defects.** — The ground upon which this doctrine rests seems to be, that the purchaser knows, in the first place, that the one who sells and attempts to convey has no personal interest to part with; that he is a public officer, acting under the provisions and subject to the requirements of a public law, which are known or presumed to be known to the purchaser; and he is therefore put upon his inquiry to ascertain whether these requirements have been complied with; for it is a principle of law, that a purchaser is chargeable with notice of all defects apparent upon the face of his muniments of title.[2]

§ 2065. **Tax-deed must be supported.** — And, accordingly, it has been held in Ohio, that, in order to have a tax-sale and deed received as evidence of title, there must be preliminary evidence submitted to the court that the land was properly *listed*, taxed, and advertised, and that all other prerequisites were complied with.[3] And one who relies upon a tax-sale is bound to show, not only the existence of an assessment, but its legality also.[4]

§ 2066. **What Purchaser under Tax-sale must prove.** — How far the party claiming under such a deed must go in making out his proof, that is, to what extent of minuteness and accuracy of detail he must show a compliance on the part of the several officers with the requirements of the statute, is spoken of in different terms by different courts. Thus, in Langdon *v.* Poor,

[1] Wofford *v.* McKinna, 23 Tex. 43; Erwin *v.* Helm, 13 Serg. & R. 151; Ballance *v.* Forsyth, 13 How. 23.

[2] Blackw. Tax Titles, 67, 85; Denning *v.* Smith, 3 Johns. Ch. 344.

[3] Games *v.* Stiles, 14 Pet. 322; Holt *v.* Hemphill, 3 Ohio, 232. See also Tolman *v.* Emerson, 4 Pick. 162.

[4] Sutton *v.* Calhoun, 14 La. Ann. 209.

the judge, in giving the opinion of the court, says: "It has sometimes been said that a *literal* compliance with the statute provisions, by all the officers connected with the proceedings, is a condition precedent to the passing of any title. Perhaps the term *literal*, in its confined sense, is rather too strong. A clear and strict compliance has always been held indispensable, even in regard to matters which, but for the statute, could appear to be of no importance." [1] And the language of Chief Justice Marshall, in Thatcher *v.* Powell, is: "In summary proceedings, where the court exercises an extraordinary power under a special statute prescribing its course, we think that course ought to be *exactly* observed, and those facts especially which give jurisdiction ought to appear, in order to show that its proceedings are *coram judice*." [2]

§ 2067. **The Question one of Jurisdiction.** — Indeed, it is uniformly held, that the power of sale does not attach until after every prerequisite of the law has been complied with.[3] And the stringency of the law in this respect, as well as the great liability there is that some step will be omitted in the process by which alone a title can be gained under a collector's sale for taxes, seems to justify the remark of Sewall, J., in Colman *v.* Anderson, "The title under which the tenant has been permitted to succeed, so far as to obtain a verdict in support of it, is of that kind almost proverbially denominated a *collector's title;*" [4] or even the declaration ascribed to the Superior Court of New Hampshire, "That a tax-collector's deed was, *prima facie*, void." [5] But still, if all the requirements of the law have been strictly complied with so as to confer on the officer a power to sell, and the conveyance be in regular form, it will vest a good title in the purchaser.[6]

[1] Langdon *v.* Poor, 20 Vt. 15. In one case, where the statute required the sale to be made *before the court-house door*, and it was made inside of it, it was held void. Rubey *v.* Huntsman, 32 Mo. 501.

[2] Thatcher *v.* Powell, 6 Wheat. 127. See also Keene *v.* Houghton, 19 Me. 368; Minor *v.* Natchez, 4 Sm. & M. 627; Ferris *v.* Coover, 10 Cal. 589; Lane *v.* Bommelmaun, 21 Ill. 143; Gaylord *v.* Scarff, 6 Iowa, 179; McGahen *v.* Carr, 6 Iowa, 331; Worthing *v.* Webster, 45 Me. 270; Alter *v.* Hinckler, 36 Ill. 267.

[3] Minor *v.* Natchez, *supra*.

[4] Colman *v.* Anderson, 10 Mass. 105, 111.

[5] Minor *v.* Natchez, 4 Sm. & M. 628.

[6] Wofford *v.* McKinna, 23 Tex. 43; Harding *v.* Tibbils, 15 Wis. 232.

§ 2068. **No Presumption arises from the Deed itself.** — And when the form and effect of such a deed are considered, Blackwell seems to be sustained when he says: "The operative character of the deed depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises from the mere production of the deed, that the facts upon which it is based had any existence. When it is shown, however, that the ministerial officers of the law have performed every duty which the law imposed upon them, and every condition essential to its character, then the deed becomes conclusive evidence of title in the grantee according to its extent and purport."[1] And yet possession under such a deed is, as has been before said, under color of title.[2]

§ 2069. **Deed made Prima Facie Evidence of Title.** — In many States a deed in statutory form is made *prima facie* evidence of title or of its own recitals. Thus, in California and Arkansas, such a deed is *prima facie* evidence of the recitals therein being true, and is made so by statute. But if any essential fact be omitted in such recital, and especially if the recitals show the omission of an important requirement, the deed will be void.[3] In Michigan and Wisconsin, a collector's deed is by statute to be taken as *prima facie* evidence of the legality of the proceedings up to the date of the deed, and, after two years, is declared to be conclusive evidence of this. But while the first part of the statute is sustained by the courts, the second is held by them to be unconstitutional.[4] But even in such cases, with the common law thus modified, if a noncompliance with any substantial prerequisite of the law is shown, all presumptions in favor of the deed are at once overthrown, and the rules of the common law prevail.[5]

§ 2070. **Requisites of a Tax-deed.** — The deed must have cer-

[1] Blackw. Tax Titles, 430.

[2] Dillingham *v.* Brown, 38 Ala. 311.

[3] Ferris *v.* Coover, 10 Cal. 589; Kelsey *v.* Abbott, 13 Cal. 600; Pillow *v.* Roberts, 13 How. 475.

[4] Stewart *v.* McSweeney, 14 Wis. 472; Groesbeck *v.* Seeley, 13 Mich. 340; Wright *v.* Dunham, id. 414. So in Iowa. McCready *v.* Sexton, 29 Iowa, 356.

[5] Blackw. Tax Titles, 431.

tain requisites in itself to be valid as a deed. In the first place, it should come within what is meant as one "of conveyance," which requires it to be in writing, and under the seal of the officer.[1] In the next place, it is not like a patent from government, which requires no formal delivery in order to its taking effect: the deed must, like other deeds, be delivered before it can be operative.[2]

§ 2071. **Whether Tax-deed should recite Power.** — It is a principle of law, that, on the execution of a power, the execution must have reference to the power itself, and that a person claiming under the execution takes under the deed by which the power is created;[3] and as it is not by the mere execution and delivery of a deed, but a deed based upon the necessary prerequisite acts by which it became lawful to sell the land which it conveys, that a title can alone be created in the purchaser, it seems to be requisite to the validity of a collector's deed, that it should recite the power under which it is made. And, in practice, it usually goes farther, and recites the act of compliance with the statute which preceded the making of the deed. In some of the States, a form of deed is prescribed by statute in such cases; and it is hardly necessary to say, that, when such is the case, the form prescribed must be adopted and strictly adhered to.[4] A tax-deed in Massachusetts is void if it omit to recite that the taxes were not paid within fourteen days after being demanded.[5]

§ 2072. **Grantee in Tax-deed.** — The deed must be made to the one who bids off the land at the sale.[6]

§ 2073. **Recording Tax-deed.** — In respect to the necessity of recording a collector's deed, there are different rules in different States, dependent upon the statutory provisions upon the subject. In Massachusetts, recording is required; so in Vermont; while in Illinois a different rule is adopted.[7]

[1] Blackw. Tax Titles, 432; Church *v.* Gilman, 15 Wend. 658.

[2] Blackw. Tax Titles, 434.

[3] Robinson *v.* Hardcastle, 2 T. R. 252; *ante*, §§ 1655, 1698.

[4] Blackw. Tax Titles, 434, 436; Smith *v.* Hileman, 2 Ill. 323; Atkins *v.* Kinnan, 20 Wend. 241, 247.

[5] Harrington *v.* Worcester, 6 Allen, 576.

[6] Blackw. Tax Titles, 444.

[7] Allen *v.* Everts, 3 Vt. 10; Tilson *v.* Thompson, 10 Pick. 359, 362; Blackw. Tax Titles, 438.

§ 2074. **Death of Owner after Tax-sale.** — If the owner of the land die between the time of the sale and the making and delivery of the deed, it does not affect the sale or impair the validity of the collector's deed afterwards given; but if the deed show upon its face the want of compliance, on the part of the officer, with any of the substantial requisitions of law, — as, for instance, that it is made to one who did not bid off the land, — it is a nullity.[1]

§ 2075. **Redemption of Land sold for Taxes.** — The peculiarity of a tax-title, by which the land is always subject to redemption by the original owner, upon paying the tax assessed, with such interest and charges as are prescribed by law, prevails in all the States, though the terms, and time of redemption, may not be uniform. Any one may redeem who has any right to the estate, whether in law or in equity, whether perfect or inchoate, in possession or in action, or in the nature of a charge or an incumbrance.[2] In some States, the deed is not given until after the time of redemption has expired; and, during this time, the interest of the purchaser is an equity which he can assign, and thereby give to his assignee a right to claim the deed from the officer. In others, the deed is made at once, and the estate may then be redeemed by the owner; in which case the title of the purchaser is at an end, without any other act done or entry made on the part of the owner.[3]

§ 2076. **Who precluded from acquiring Tax-title.** — A deed made to one in possession to whom the tax is set, and who is in duty bound to pay it, would be void: his performing a duty in respect to the estate does not change the title to the same.[4] And the same rule would apply in all cases where the one paying the tax is under moral or legal obligation to do so. If he suffers the estate to be sold, and buys it in, directly or indirectly, he gains no title thereby. But being in possession of an estate does not, of itself, preclude the right to buy at a tax-sale.[5]

[1] Blackw. Tax Titles, 449, 450.

[2] Rice *v.* Nelson, 27 Iowa, 148. For the person, to whom a tender must be made in order to redeem from a tax-sale, see Faxon *v.* Wallace, 101 Mass. 444.

[3] Blackw. Tax Titles, 445, 490; Blight *v.* Banks, 6 Mon. 206; Taylor *v.* Steele, 1 A. K. Marsh. 315; Cooper *v.* Brockway, 8 Watts, 162.

[4] McMinn *v.* Whelan, 27 Cal. 319.

[5] Moss *v.* Shear, 25 Cal. 45; Piatt *v.* St. Clair, 6 Ohio, 227; Choteau *v.* Jones, 11 Ill. 322.

§ 2077. **General Principles governing Validity of all Involuntary Sales.** — In closing these brief sketches of the law relative to the acquisition of title by what has been called an office or official grant, there are one or two considerations to be presented, which apply, substantially, to all these modes which have been enumerated. Where land is conveyed under a special authority, that authority must be strictly pursued; and every purchaser is to be presumed to know that especial authority, where it is derived from an act of the legislature; and if he purchases where that special authority has not been pursued, he purchases at his peril.[1] Where, therefore, the law required a guardian, upon making sale of land, to make return to the court, and, if approved by the court, it was to be recorded, and should "vest in the purchaser all the interest the ward had in the estate so sold," and a sale was made and deed given, but no return made to or accepted by the court, it was held that nothing passed by such deed.[2] And this doctrine extends to all cases of involuntary alienations of lands belonging to persons other than those who make such alienation. Their validity depends upon a strict compliance with all the substantial requirements of the law by which such alienation is made. Such is the case where private property is taken for public use,[3] and where land is taken by levy of execution against the judgment debtor.[4] So with the sale of land by an administrator to pay debts of the deceased by order of court. And where the statute required such a deed to "set forth at large" the order of the court directing the sale, a recital merely of the substance of such order was held not to be a compliance with the act, and ineffective as a deed.[5] And in case of sales for non-payment of taxes, "to make out a valid title under such sales, great strictness is to be required, and it must appear that the provisions of law preparatory to and authorizing such sales have been punctiliously complied with."[6]

[1] Denning *v.* Smith, 3 Johns. Ch. 344; Blackw. Tax Titles, 52, 56, 57, 65.

[2] Young *v.* Keogh, 11 Ill. 642.

[3] Flatbush Avenue, 1 Barb. 286.

[4] Metcalf *v.* Gillet, 5 Conn. 400; Wellington *v.* Gale, 13 Mass. 483, 488; Morton *v.* Edwin, 19 Vt. 77; Sargent *v.* Peirce, 2 Met. 80.

[5] Smith *v.* Hileman, 1 Scam. 323; Atkins *v.* Kinnan, 20 Wend. 241.

[6] Brown *v.* Veazie, 25 Me. 359; Langdon *v.* Poor, 20 Vt. 13.

§ 2078. **Judgment must always accompany Deed.** — And in establishing a claim to a title by virtue of a sale of or levy upon land under an execution, or of a sale by a guardian or administrator under order of court, or by a master or commissioner under a decree of a court of chancery, not only must the requirements of law have been complied with in all respects, but the judgment and execution, the order or decree, must be produced, unless, as has already been stated, some statute shall obviate the necessity of this, by raising presumptions in favor of the regularity of proceedings, under which a deed regular in form shall have been executed and delivered.[1]

§ 2079. **Deed cannot be impeached for Mere Irregularity.** — But if, in the case of a sale by a sheriff, guardian, etc., a judgment and execution, or order or decree, and sale, be established, it is not competent to impeach the title by contradicting the deed, made in pursuance of the power thus vested in the officer, by evidence that he did not make it under that power, but some other, or that he did not intend to sell a part of what is conveyed.[2]

§ 2080. **Sheriff's Return conclusive.** — Where a statute requires a ministerial officer, like a sheriff, to make a return of his doings in making a levy, for instance, upon land, such return is conclusive evidence between the creditor and debtor in the execution, and all persons claiming under them respectively.[3]

[1] Hamilton *v.* Adams, 2 Murph. 161 ; Jackson d. Webb *v.* Roberts, 11 Wend. 425 ; Minor *v.* Natchez, 4 Sm. & M. 602 ; Dunn *v.* Meriwether, 1 A. K. Marsh. 158 ; Weyand *v.* Tipton, 5 Serg. & R. 332 ; Ware *v.* Bradford, 2 Ala. 676 ; Bledsoe *v.* Doe, 4 How. (Miss.) 25 ; Lyerly *v.* Wheeler, 11 Ired. 288 ; Doe d. Williamson *v.* Bedford, 10 Ired. 198.

[2] Jackson d. Webb *v.* Roberts, 11 Wend. 425 ; Snyder *v.* Snyder, 6 Binn. 489 ; Jackson d. Russell *v.* Croy, 12 Johns. 427 ; Jackson d. Clowes *v.* Vanderheyden, 17 Johns. 167. See Minor *v.* Natchez, 4 Sm. & M. 602 ; Ware *v.* Bradford, 2 Ala. 676.

[3] Bott *v.* Burnell, 11 Mass. 163, 165 ; Whitaker *v.* Sumner, 7 Pick. 551, 555. See Butts *v.* Francis, 4 Conn. 424.

CHAPTER XCVII.

TITLE BY PRIVATE GRANT — GENERAL REQUISITES OF GRANT BY DEED.

§ 2081. Deed now necessary to convey land.
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2125 The execution.

§ 2081. **Deed now necessary to convey Land.** — Although, at the present day, the mode in universal use, by which one individual aliens or conveys his land to another, is by deed, it should not be forgotten that the requirements of a formal instrument in writing, in order to pass title to lands themselves, is as recent as Charles II., near seventy years after the first settlement of Virginia. And although charters, as evidence of title, had been common, there was no law which required a deed or other written instrument, as a means of conveying lands, prior to the statute of frauds, so called, 29 Charles II.; although the statute of *quia emptores* had made lands freely alienable, and the statute of uses had done away, substantially, with the form of livery of seisin or feoffment known to the common law.[1] The exceptions to this, however, were, first, in respect to the conveyance of interests in land which could not be evidenced and accompanied by formal livery of seisin, because of their being of an incorporeal nature, which, therefore, lay only in grant, and not in livery, and always required a deed as a means of transfer;[2] and, second, the requirements of the act of enrolment, 27 Henry VIII. c. 16, which rendered a deed indented and enrolled necessary in order to give effect to a conveyance by bargain and sale. But this did not apply to other deeds which took their rise under the statute of uses, nor to deeds of feoffment.[3]

§ 2082. **Statute of Frauds in the United States.** — The English statute of frauds has been followed, more or less exactly, by the statutes of the several United States, all of which require an instrument in writing in order to the conveyance of lands or any interest therein. And, with the exception of three or four States, a deed under the hand and seal of the grantor is necessary, if the interest to be thereby transferred

[1] Roberts, Frauds, 270; Browne, Stat. Frauds, 3, 4; Wms. Real Prop. 126.
[2] 1 Wood, Conv. 7, 8; 2 Bl. Com. 317.
[3] Wms. Real Prop. 150.

is a freehold one.[1] Accordingly, where one holding by a deed made a written agreement to convey to another upon being paid a certain sum, and the latter paid the same, but the owner refused to execute a deed, it was held that the bargainee could not maintain a real action to recover the land without first compelling the owner, by a bill in equity to enforce performance, to execute to him a deed of the premises.[2]

§ 2083. **Of Parol Conveyances enforced in Equity.** — There is a class of cases which ought to be referred to in this connection, where, though no formal deed has been made, such proceedings have been had *in pais* between the parties as to lay the foundation for proceedings in a court of equity to enforce a conveyance by deed; as where, under a contract to convey land, acts have been done by the parties which are deemed to be a *part performance* of the contract, and the court is applied to compel a complete specific performance of contract by giving a deed. These remarks, however, are not intended to apply to cases where the purchaser holds a written agreement from the vendor of the estate. Thus it has been held, that if, under a parol contract to convey, and, after part or full payment of the purchase-money is made, the possession of the estate is delivered to and taken by the purchaser, and he enters upon and occupies the estate, it takes it out of the statute of frauds, and the court will decree a specific performance "if vendor fraudulently withholds a conveyance, or, by so doing, he commits a fraud."[3] Where a father gave wild land to his son and wife, to be theirs as long as they lived, and they went on and made expensive improvements upon the same, and paid part of the taxes, it was held that the donees could enforce the agreement in equity on the ground of part performance on the part of the donees, although the agreement to give the land was oral, and not in

[1] Stewart *v.* Clark, 13 Met. 79; Colvin *v.* Warford, 20 Md. 396; Underwood *v.* Campbell, 14 N. H. 396.

[2] Wilson *v.* Black, 104 Mass. 406.

[3] Ryan *v.* Dox, 34 N. Y. 312; Phillips *v.* Thompson, 1 Johns. Ch. 131, 149; Wetmore *v.* White, 2 Caines' Cas. 87; Fonbl. Eq. Laussat's ed. 150, 151; Lowry *v.* Tew, 3 Barb. Ch. 407; Parkhurst *v.* Van Cortland, 14 Johns. 15, 36; s. c. 1 Johns. Ch. 284, 285; DeWolf *v.* Pratt, 42 Ill. 207; Miller *v.* Ball, 64 N. Y. 286; Winchell *v.* Winchell, 2 Eastern Rep. 451.

writing.[1] But equity will not enforce a specific performance against a man whose wife refuses to execute the deed, unless the vendee will pay the full purchase-money upon receiving the husband's deed without that of the wife.[2] The rule upon this subject, as applied in Pennsylvania, is understood to be this: Payment of the purchase-money is not enough; but if the parol contract be so far executed that it would work a fraud to rescind it, — that is, if what has been done under it is incapable of being compensated for at law, — an equitable title passes, notwithstanding the statute. There must be a delivery of possession.[3] Thus a sale by a landlord to his tenant would not be sufficient, nor by one tenant in common to another, because the purchaser is already in possession. And the taking possession must be under and by virtue of the contract on which the claim for specific performance is based.[4] Nor is mere taking possession enough, unless followed by such improvements and arrangements as will not reasonably admit of a compensation in damages.[5] In all these cases, it is apprehended, that, in order to have a court of equity interpose to compel a conveyance, there must be a definite specific agreement to sell and purchase proved. It must have been followed by acts of the parties, which, in their nature, form a part performance of such an

[1] Freeman *v.* Freeman, 43 N. Y. 34; Neale *v.* Neale, 9 Wall. 1, case of parol gift where donee has made improvements, enforced by the United States court; Dugan *v.* Gittings, 3 Gill, 157, case of a gift of a house to a daughter in contemplation of marriage; Syler *v.* Eckhart, 1 Binn. 378, case of a parol gift of father to son, who took possession and made improvements; Rhodes *v.* Rhodes, 3 Sandf. Ch. 279, case of parol gift as a consideration for supporting the owner, which was performed by the donee; King *v.* Thompson, 9 Pet. 221; Harsha *v.* Reed, 45 N. Y. 419; Peters *v.* Jones, 35 Iowa, 512, 515; Woodbury *v.* Gardner, 77 Me. 68; Thurbur *v.* Meves, 119 Cal. 35; s. c. 50 Pac. Rep. 1063.

[2] Riesz's Appeal, 73 Penn. St. 485.

[3] Ward *v.* Stuart, 62 Tex. 333.

[4] Moore *v.* Gordon, 44 Ark. 334; Felton *v.* Smith, 84 Ind. 485.

[5] Hill *v.* Meyers, 43 Penn. 170, 172, 173; Moyer's App., 105 Penn. St. 432; Lord's App., id. 451; Glass *v.* Hulbert, 102 Mass. 24, 43. But in Green *v.* Jones, 76 Me. 563, it was held that part payment of the purchase-money, together with entry and possession, were enough to call for a decree of specific performance. And to the same effect is Pleasanton *v.* Raughley, 3 Del. Ch. 124. And in Jamison *v.* Dimock, 95 Penn. St. 52, it was held that the purchaser might have a decree for specific performance, although he had not made any improvements for which he could not be compensated in damages.

agreement. If the vendor refuses to execute on his part, the vendee would be without an adequate remedy in damages by a suit at law, and a failure to perform works a fraud upon the party who seeks performance. There is, in Laussat's note to Fonblanque, a collection of cases upon the point of what amounts to a part performance; and these, with the other cases cited above, it is believed, will sustain the other points as here stated.[1] But a court of equity has no jurisdiction over the legal rights of parties; nor could it settle a question of disputed boundary, unless some equity was superinduced by the acts of the parties.[2] In Mississippi, a decree for specific performance will not be rendered upon a parol agreement to convey lands, even where there has been a part performance.[3] And where the grantee, under a covenant to purchase lands, entered upon them, and made expensive improvements, but declined to accept a deed because of an existing easement which affected the value of the estate, the court refused to compel him to execute his covenants as to that part which was not affected by this easement, but gave him a lien on the land for what he had expended until the owner reimbursed him therefor.[4] And where the owner of land, having a dwelling-house upon it, contracted with another to sell the same, and the purchaser paid the purchase-money, but, before the deed was delivered, the house was burned, it was held, that the vendor could not enforce the contract against the vendee, and the vendee could recover back the money he had paid. The loss in such case falls upon the actual owner at the time it occurred.[5] A case in Ohio may be referred to as showing how proceedings in equity in regard to the conveyance of lands may sometimes have effect, even though the court may not have jurisdiction over the subject-matter of the lands. Parties living in Kentucky were heirs

[1] Fonbl. Eq. Laussat's ed. 152, note, B. 1, c. 3, § 8; Phillips *v.* Thompson, 1 Johns. Ch. 131, 149; Parkhurst *v.* Van Cortland, 14 Johns. 36.

[2] Tillmes *v.* Marsh, 67 Penn. St. 511; Norris's App., 64 Penn. St. 275.

[3] McGuire *v.* Stevens, 42 Miss. 724, 732; Beaman *v.* Buck, 9 Sm. & M. 210; Box *v.* Stanford, 13 Sm. & M. 93.

[4] Gibert *v.* Peteler, 38 N. Y. 165.

[5] Thompson *v.* Gould, 20 Pick. 134; Wells *v.* Calnan, 107 Mass514; Bacon *v.* Simpson, 3 Mees. & W. 78; Gould *v.* Murch, 70 Me. 288.

to lands in Ohio which their ancestor had covenanted to convey to A B. He brought a bill in equity, in Kentucky, to enforce this contract, in which the heirs appeared, and a decree of specific performance was rendered. After that, the heirs brought an action at law, in Ohio, to recover these lands against A B, who set up this decree in defence on the ground, that, in Ohio, an equitable defence may be availed of in a suit at common law to recover land. The court held, that, although no judgment or decree in one State can operate upon lands in another, it was binding upon the parties, and might be enforced by attachment in Kentucky, and, as such, might be used as an equitable defence in Ohio.[1]

§ 2084. **Lex Loci governs Transfer of Estates.** — It may be assumed as a preliminary maxim, that title to lands can only be acquired or lost according to the laws of the State in which they are situate.[2] "No man has any vested right to dispose of any property, by whatever title he holds, in any way other than that by which the law prescribes."[3]

§ 2085. **Effect of United States Stamp Acts.** — [It is incompetent for Congress to prescribe the mode of transferring realty, or rules of evidence to govern the State courts. Consequently the revenue act which requires a deed to be stamped and which declares that it shall be void unless stamped, while it may furnish a perfectly valid rule of evidence for the United States courts, is not binding upon the State courts.[4]]

§ 2086. **Deed defined.** — A deed is defined to be a writing containing a contract sealed and delivered by the party thereto. This is Lord Coke's definition, and does not embrace the *signing* of the instrument, which, at common law, was not necessary, as will appear more fully hereafter. In most of the States, however, a signing is required; and, in all, it is uni-

[1] Burnley *v.* Stevenson, 24 Ohio St. 474; Massie *v.* Watts, 6 Cranch, 148.

[2] Clark *v.* Graham, 6 Wheat. 577; Doe d. Moore *v.* Nelson, 3 McLean, C. C. 383. By statute in Illinois, a deed good in the State where made will convey lands in Illinois; and the same is the law in Michigan. Root *v.* Brotherson, 4 McLean, C. C. 230; Butterfield *v.* Beall, 3 Ind. 203.

[3] Lies *v.* De Diablar, 12 Cal. 330.

[4] Carson *v.* Phelps, 40 Md. 73; Morgan *v.* Graham, 35 Iowa, 217; Forcheimer *v.* Holly, 14 Fla. 243; Moore *v.* Moore, 47 N. Y. 467; s. c. 7 Am. Rep. 466; Moore *v.* Quirk, 105 Mass. 47; Trowbridge *v.* Addoms, 23 Col. 518; s. c. 48 Pac. Rep. 535.

formly practised. But a deed, under all circumstances, implies and requires a seal; and without something answering to a seal according to the law of the State where the land lies, it cannot be a deed.[1]

§ 2087. **Essentials of Valid Deed as given by Coke.** — Lord Coke considers ten things essential to a valid deed of conveyance: *first*, writing; and printed words in a deed are a part of it, to the same effect as if written;[2] *second*, parchment or paper; *third*, a person able to contract; *fourth*, a sufficient name; *fifth*, a person able to be contracted with; *sixth*, a sufficient name; *seventh*, a thing to be contracted for; *eighth*, apt words required by law; *ninth*, sealing; *tenth*, delivery.[3]

§ 2088. **The Material on which a Deed is written.** — Writers upon the subject, and courts in their opinions, adopt the dogma, that, in order to be a deed, the materials on which its contents are written must be parchment or paper; and the reason given places the rule upon the ground of policy, that writing upon such materials is less likely to be altered, vitiated, or corrupted; though it is not entirely obvious why a deed written upon cloth of a suitable texture and substance, or the skins of animals properly prepared, though not manufactured into parchment, if susceptible of showing what is written upon them, might not be of equal validity with instruments written on paper or proper parchment. But the rule seems to be otherwise.[4]

§ 2089. **The Writing.** — The law, fortunately, is far from being strict in requiring any great accuracy or precision in respect to what is written, so far as the rules of grammar or orthography are concerned, or as to the chirography or evenness of the page, or the straightness of the lines. False Latin, though it be very bad, will not avoid a deed.[5]

[1] Co. Lit. 171 *b*; Wms. Real Prop. 123; Shep. Touch. 50; 1 Wood, Conv. 129; Van Santwood *v.* Sandford, 12 Johns. 198; Hammond *v.* Alexander, 1 Bibb, 333; Taylor *v.* Morton, 5 Dana, 365. See Hutchins *v.* Byrnes, 9 Gray, 367.

[2] Wallwork *v.* Derby, 40 Ill. 530.

[3] Co. Lit. 35 *b*; 1 Wood, Conv. 125; Shep. Touch. 54.

[4] Co. Lit. 35 *b*; 1 Wood, Conv. 126; Shep. Touch. 50, 54; 2 Bl. Com. 297; Warren *v.* Lynch, 5 Johns. 246.

[5] Shrewsbury's case, 9 Rep. 48; Shep. Touch. 55; 1 Wood, Conv. 125; Perkins, § 123; Watters *v.* Bredin, 70 Penn. St. 237.

§ 2090. **The Writing must be complete before Delivery**; what is added afterwards being of no avail;[1] though there are some authorities which sustain the doctrine, that blanks existing at the time of the delivery of a bond under seal may be filled by an agent afterwards.[2]

§ 2091. **Filling in Blanks.** — Nor is it easy to reconcile the cases, some of which may be found cited below; though the question would seem to turn in some, if not in all of them, upon whether the blanks were filled before or after the *delivery* of the deed. Thus, where a wife signed and sealed a blank deed, and handed it to her husband to fill in the name of the grantee, the description and the release of her dower, which he did, and then executed it, and informed her, and she assented, but the deed was not present, and had been delivered, it was held not to be her deed, though it would have been effectual if she had delivered it after it had been filled up.[3] And the same court, in another case, held, that where a deed was executed by husband and wife, with a blank left for the grantee's name, and the covenants which it contained were qualified, but she, by parol, expressly authorized him to insert the name and strike out the qualification of the covenant, and he did so before he delivered it, which was known to the grantee, but not to her, this avoided the deed as to her. The alteration and filling of the blank, to be effectual, must have been done by some one acting under a power of attorney under seal, or by a delivery by her after these changes had been made.[4] Accordingly, where one signed, sealed, and acknowledged a blank deed, and afterwards inserted the grantee's name, and a description of the premises intended to be granted, and then delivered it, it was held to bind him as a valid deed.[5] The case of Texira *v.* Evans, cited below, was that of a bond which the maker signed, leaving the sum blank, and handed it to an

[1] 1 Wood, Conv. 125; Shep. Touch. 541; Duncan *v.* Hodges, 4 M'Cord, 239; Perminter *v.* M'Daniel, 1 Hill (S. C.), 267; Wheeler *v.* Single, 62 Wis. 380. See American cases collected in the note to 6 Mees. & W. 216, Am. ed.; Burns *v.* Lynde, 6 Allen, 305, fully sustains the text, and is opposed to Texira *v.* Evans.

[2] Texira *v.* Evans, cited 1 Anstr. 228.

[3] Burns *v.* Lynde, 6 Allen, 305; Vose *v.* Dolan, 108 Mass. 159.

[4] Basford *v.* Pearson, 9 Allen, 388; Drury *v.* Foster, 2 Wall. 24.

[5] Conover *v.* Porter, 14 Ohio St. 450.

agent to take it to the obligee and fill up with the sum he should be willing to loan. This was done, and the bond held good. The court in Iowa examine this case carefully, and hold that a sealed instrument executed and delivered with blanks in the material parts would be void, though afterwards filled up. And in this they agree with the Virginia courts, who held that where A and B signed a bond, leaving the obligee's name a blank, intending to apply to F for the money, B took the bond, and F, declining to loan the money, obtained it of H, and filled in his name as obligee in the absence of A: it was held not to be the bond of A; "when the writing left the hands of A, it was not a deed."[1] But if filled up before delivery, it would be good.[2] In a case in New York, a mortgage with the mortgagee's name in blank was held void, even in a *bona fide* holder's hands. But two of the judges thought it might have been filled by parol authority of the maker, and have been valid.[3] In one case in the Exchequer, it was held that a deed of stock was void, the purchaser's name having been inserted after delivery; and the court in this case denied Texira *v.* Evans to be law.[4]

§ 2092. **Parol Authority to fill Blanks.** — Some of the cases have turned upon the point, whether a parol authority by the grantor in a deed to one to fill material blanks would be sufficient to bind him; though probably, if this were done before it was delivered, any knowledge or presumed assent on the part of the grantor might give effect to such act of the attorney. The language of the court in Drury *v.* Foster, cited above, seems to favor the notion, that if one hand a deed, duly executed, with parol authority to fill blanks, and this is done, he is estopped to deny its validity. Nelson, J., says: "The better opinion at this day is, that the power is sufficient." And the court in Maine say: "It seems to be now settled, that where a party executes a deed or bond, and delivers the same to another

[1] Preston *v.* Hull, 23 Gratt. 605.

[2] Simms *v.* Hervey, 19 Iowa, 290–296. See also People *v.* Organ, 27 Ill. 29; Gilbert *v.* Anthony, 1 Yerg. 69; Wynne *v.* Governor, id. 149.

[3] Chauncey *v.* Arnold, 24 N. Y. 330.

[4] Hibblewhite *v.* M'Morine, 6 Mees & W. 200; Com. Dig. Fait, A, 1, reaffirmed by Parke, B., in Davidson *v.* Cooper, 11 Mees. & W. 794; Perk. § 118; Touch. 54.

in an imperfect state, and gives authority to that person to fill up the blanks, and thus perfect the instrument, and he does so, its validity cannot be controverted. This authority may be by parol; it may be implied from the facts proved, when those facts, fairly considered, justify the inference."[1]

§ 2093. **Parol Authority to fill Blanks — The Cases summed up.** — The result of the cases may be summed up thus: After delivery, blanks cannot be filled up except by one having authority under seal, or by the grantor, followed by a re-delivery. This rule has been so strictly applied in some States, that even before delivery such filling of blanks could not be done by one who was acting by authority not under seal, if not in the grantor's presence; and a deed so executed was held invalid between the original parties, at least if aware of the mode of execution. But in favor of innocent third parties such a deed would bind the grantor by estoppel. And the better opinion seems to be that such parol authority is sufficient to authorize the filling in of blanks, before an actual delivery, the possession of the agent being that of the grantor.

§ 2094. **Of Alterations, Erasures, Interlineations.** — This rule leads to the inquiry, how far alterations, erasures, or interlineations, in the writing of a deed, affect its validity. To give the instrument the effect designed by such alterations, they must be made before the delivery of the deed.[2] Where A made a deed of one undivided half of a lot, and two years afterwards sold the other half to the same grantee, whose former deed had not been recorded, and he took the deed and struck out "one undivided half," and *delivered* it again, it was

[1] South Berwick *v.* Huntress, 53 Me. 90. See also Wiley *v.* Moor, 17 Serg. & R. 438; McDonald *v.* Eggleston, 26 Vt. 161, 162. See also 1 U. S. Dig. 433, pl. 10; 6 Mees. & W. Am. ed. 216, note; Cribben *v.* Deal, 21 Oreg. 211; s. c. 27 Pac. Rep. 1046; Schwartz *v.* Ballou, 47 Iowa, 188; Van Etta *v.* Evenson, 28 Wis. 33; Field *v.* Stagg, 52 Mo. 534; Lafferty *v.* Lafferty, 42 W. Va. 783; s. c. 26 S. E. Rep. 262. *Contra:* Upton *v.* Archer, 41 Cal. 85; Viser *v.* Rice, 33 Tex. 139; Cross *v.* State Bank, 5 Ark. 525; Maus *v.* Worthing, 4 Ill. 26; Ingram *v.* Little, 14 Ga. 173; Burns *v.* Lynde, 6 Allen, 305; Basford *v.* Pearson, 9 Allen, 387; William *v.* Crutcher, 5 How. (Miss.), 71; s. c. 10 Am. Rep. 267, note. In a late case in Illinois it was said that the deed would be valid if the filling in were proved to have been done by consent of both parties. Miller *v.* Crouse, 159 Ill. 91; s. c. 42 N. E. Rep. 377.

[2] 1 Wood, Conv. 126; Shep. Touch. 69.

held to convey the entire estate.[1] If made afterwards, it either avoids the instrument altogether, or is treated as of no effect. If the contract thereby evidenced is an executory one, any material alteration made by the holder or a stranger will avoid it, unless done by consent of the maker, or without the knowledge and assent of the holder.[2] If the alterations be in an unimportant matter, or made by a stranger, it will not affect the instrument.[3] Thus, where the lessee, after the lessor's death, altered the words "E. Street" to "W. Street," it was held not to be a material alteration, because other parts of the lease showed that the original should have been W. Street.[4] And a like doctrine was applied to the interlineation of an important clause in one part of a deed, from the circumstance that the same clause was found in another part of the deed.[5] But where a mortgagee, without the knowledge of the mortgagor, increased the amount of the consideration, it was held to make the mortgage void.[6] And where the grantee in a deed admitted that he had altered the deed, but alleged that he did it with the consent of the grantor, it was held that the burden was on him of proving the consent of the grantor.[7]

§ 2095. **Alterations — The Burden of Proof.** — In these cases, therefore, it becomes exceedingly important to settle, as a rule of law, upon which party lies the burden of proof to determine the character of such alterations. If the law presumes them to have been made before the delivery of the instrument, then any apparent erasure, interlineation, or alteration, does not affect its validity, unless affirmatively shown to have been made after the delivery; otherwise it would be void, unless the contrary were established. The rules given by the books, and laid down by different courts, are singularly diverse and unsatisfactory. Thus in Wood's Conveyancing, Preston's edition of the Touchstone, and Perkins, it is treated

[1] Bassett *v.* Bassett, 55 Me. 126.

[2] Shep. Touch. Prest. ed. 69; Com. Dig. Fait, F. 1; Deem *v.* Phillips, 5 W. Va. 168.

[3] Shep. Touch. 69; Com. Dig. Fait, F. 1; 11 Mees. & W. 803, note to Am. ed. and cases cited; Robertson *v.* Hay, 91 Penn. St. 242.

[4] Jordan *v.* Stevens, 51 Me. 78.

[5] Gordon *v.* Sizer, 39 Miss. 818.

[6] Johnson *v.* Moore, 33 Kan. 90.

[7] Havens *v.* Osborn, 36 N. J. Eq. 426.

as "greatly suspicious," if the erasure or alteration be material, if it is not proved to have been made before delivery.[1] Coke says: "Of ancient time, if the deed appeared to be raised or interlined in places material, the judges adjudged, *upon their view*, the deed to be void. But of later times, the judges have left that to the jurors to try whether the raising or interlining were before the delivery;"[2] while the court in Keble say, an interlineation, without anything appearing against it, will be *presumed* to be at the time of the making the deed, and not after.[3] But in Pennsylvania, the court in one case, in the language of McKean, C. J., say: "An interlineation, if made, after the execution of a deed, will avoid it, though in an immaterial part: nor is it to be presumed to have been made before; the presumption is the contrary, unless proved."[4]

§ 2096. **Alterations — The Modern Doctrine.** — This subject is discussed by Mr. Greenleaf in his work on Evidence, and numerous cases are cited. The cases are also collected in the American edition of Smith's Leading Cases, cited below, to which the reader is referred.[5] The modern doctrine, however, seems to be, that it would not be competent for the court, upon mere inspection of an instrument, to declare it void by reason of alterations or erasures apparent upon its face, nor for the jury to do so by mere inspection, and detecting that such alterations have been made; but that is a matter of evidence in which the presumptions are against the party holding and offering the instrument in evidence, and he is to be called on to explain them, as being exceedingly suspicious, especially if the alterations are found to be favorable to him on inspection of the whole instrument. Though, even in this respect, the rule is not uniform; that of the United States court seeming to be more stringent than that of many of the States. Thus, in United States *v.* Linn, the court remark: "But it is said, the law imposes upon the party who claims under the instrument the burden of explaining the alteration. This is the rule undoubtedly where the alteration appears on

[1] 1 Wood, Conv. 126; Perkins, §§ 125, 128; Shep. Touch. 55.

[2] Co. Lit. 225 *b*; Shep. Touch. 69.

[3] Trowel *v.* Castle, 1 Keble, 22.

[4] Morris *v.* Vanderen, 1 Dall. 67.

[5] 1 Greenl. Ev. § 564; 1 Smith, Lead. Cas. (5th Am. ed.) 961 *et seq.*

the face of the instrument as an erasure, interlineation, and the like. In such case, the party having the possession of the instrument, and claiming under it, ought to be called upon to explain it. It is presumed to have been done while in his possession." [1] But in the United States Circuit Court it was held, that where the evidence as to when an interlineation was inserted in a deed was conflicting and evenly balanced, the presumption was that the words were put in before execution.[2] In Massachusetts the court say: "There is no such legal presumption (that the alterations were made before delivery). The burden is on the party offering the instrument to prove the genuineness of the instrument, and that the alterations apparent on the same were honestly and properly made. To what extent he shall be required to introduce evidence will depend upon the peculiar circumstances of each case. There is no presumption of law, either that the alterations and interlineations apparent on the face of the deed were made prior to the execution of the instrument, or that they were made subsequently: that question is to be settled by the jury upon all the evidence in the case." [3] The rule as given by the court of Missouri is perhaps as feasible as any: "As a general rule, if any presumption at all is indulged, the law will presume that the alteration was made before or at least contemporaneous with the signing of the writing, unless peculiar circumstances of suspicion are patent upon its face; and even then the whole question is one for the jury to settle upon the facts, when and where, and with what intent, the alteration was made." [4]

[1] United States *v.* Linn, 1 How. 104; Galland *v.* Jackman, 26 Cal. 85.

[2] Cox *v.* Palmer, 1 McCrary, C. C. 431.

[3] Ely *v.* Ely, 6 Gray, 439, 441. See Hills *v.* Barnes, 11 N. H. 395, rather favoring the rule of the United States court. Knight *v.* Clements, 8 Ad. & E. 215, favors the rule in Massachusetts. See also Clifford *v.* Parker, 2 Mann. & G. 909, which seems to incline to that of the United States court. Wilde *v.* Armsby, 6 Cush. 314, 318; Wickes *v.* Caulk, 5 H. & J. 36; Matthews *v.* Coalter, 9 Mo. 705; Beaman *v.* Russell, 20 Vt. 205, — go to sustain the rule in Massachusetts. Jackson d. Gibbs *v.* Osborn, 2 Wend. 555; Herrick *v.* Malin, 22 Wend. 388; Waring *v.* Smyth, 2 Barb. Ch. 133. See generally 1 Smith, Lead. Cas. (5th Am. ed.) 962, 963; Norwood *v.* Fairservice, Quincy, 189; Carpenter *v.* Fairservice, id. 239; Dow *v.* Jewell, 18 N. H. 356, reaffirming Hills *v.* Barnes; Comstock *v.* Smith, 26 Mich. 306, 317.

[4] McCormick *v.* Fitzmorris, 39 Mo. 34.

§ 2097. **Noting Alterations on the Deed.** — All writers agree that the only safe way in making such erasures or alterations is by noting them in some way upon the instrument itself, to show they were made before its delivery. The effect of such erasure or alteration is mainly important in respect to deeds which form the basis of an action, in which the authenticity of the instrument is necessary as a part of the legal proof; as where the grantee of land, with covenants, seeks to recover upon the covenants in his deed.[1]

§ 2098. **Alterations do not destroy the Title.** — But where, by the making and delivery of the deed, the title passes, being, in effect, an act of conveyance, no subsequent alterations in the deed, or even its cancellation or destruction, will, of itself, defeat or divest the title which has once passed.[2] While it would not affect a title already acquired by it, such alteration would be fatal to an action brought upon the covenants in the deed.[3] And it is said, that, if a deed were lost, equity might compel the grantor to give a new one.[4] And if a deed of an incorporeal hereditament be lost, the grantor may supply the proof by parol evidence. But where one, holding a deed of a ground-rent, fraudulently altered or destroyed it, it was held that his claim and title were gone. He could not take advantage of his own wrong by introducing secondary evidence of the deed; and, without his deed, there would be no presumption of tenure implying anything like a feudal liability for rent ser-

[1] Arrison *v.* Harmstead, 2 Penn. St. 191; 1 Smith, Lead. Cas. (5th Am. ed.) 960; Davidson *v.* Cooper, 11 Mees. & W. 800.

[2] Arrison *v.* Harmstead, 2 Penn. St. 191; Miller *v.* Gilleland, 19 Penn. St. 119, per Gibson, J.; Davidson *v.* Cooper, 11 Mees. & W. 800; Shep. Touch. Prest. ed. 69; Leech *v.* Leech, 2 Rep. in Chanc. 100; Co. Lit. 225 *b*, note 136; Com. Dig. Day's ed. Fait, F. 2, note; Hatch *v.* Hatch, 9 Mass. 307; Jackson d. Simmons *v.* Chase, 2 Johns. 84; Bolton *v.* Carlisle, 2 H. Bl. 263, 264; Dana *v.* Newhall, 13 Mass. 498; Nicholson *v.* Halsey, 1 Johns. Ch. 417; Smith *v.* McGowan, 3 Barb. 404; Raynor *v.* Wilson, 6 Hill, 469; Schutt *v.* Large, 6 Barb. 373; Roe d. Berkeley *v.* York, 6 East, 86; Miller *v.* Manwaring, Cro. Car. 399; Lewis *v.* Payn, 8 Cow. 71; Fletcher *v.* Mansur, 5 Ind. 267, where grantee's Christian name was blank, and after the deed was delivered to him he inserted the name of his wife, it was held to be a void act, and to convey no title to her. *Vide* 5 Hurls. & N. 94, Am. ed. note; Chessman *v.* Whittemore, 23 Pick. 231; Rifener *v.* Bowman, 53 Penn. St. 318; 1 Greenl. Ev. § 568; Woods *v.* Hilderbrand, 46 Mo. 284.

[3] Davidson *v.* Cooper, 11 Mees. & W. 800; Woods *v.* Hilderbrand, 46 Mo. 284.

[4] King *v.* Gilson, 32 Ill. 354.

vice.[1] In one case, where a deed had been lost before being recorded, the court enjoined the heirs of the grantor, he being dead, from conveying the estate, and passed a decree vesting the title of the estate in the purchaser.[2]

§ 2099. **Grantor must be competent.** — The next requisite, in the order of Lord Coke, for a good deed, is a party competent to execute it, and thereby make a grant. There are but few persons who may not make a deed, which, either absolutely or qualifiedly, binds them. Many deeds, which, by the early law, would have been deemed void for want of capacity in the maker, are now held to be voidable only; the tendency in modern decisions being to regard a deed, if not asbolutely binding, *voidable*, rather than *void*. Among those who formerly were held incapable of making a deed were infants, aliens, married women, and persons of non-sane memory; though, by an absurd rule of law, no man was admitted to stultify himself, and it was left for the heirs only of an insane man to avoid his deed.[3]

§ 2100. **Deeds of Married Women.** — At common law, it was the general rule, that the deed of a *feme covert*, unless joined by her husband, was void;[4] and for that reason, if, after becoming discovert, she again deliver a deed which she had delivered during coverture, it takes effect only from such second delivery;[5] but at the present day, in several States, by statute a married woman may convey her real estate without her husband joining in the deed or assenting thereto.[6]

[1] Wallace *v.* Harmstad, 44 Penn. 492, 503.

[2] Wright *v.* Christy, 39 Mo. 125.

[3] 1 Wood, Conv. 126, 138; Shep. Touch. 56; Den d. Ballew *v.* Clark, 2 Ired. 23, which states that the doctrine that a party may not stultify himself is wholly exploded. The law is the same in Tennessee. See Doe d. Rice *v.* Dignowitty, 4 Sm. & M. 57; Dicken *v.* Johnson, 7 Ga. 484, for the degree of insanity which will avoid a deed.

[4] Shep. Touch. Prest. ed. 56 and note; Zouch *v.* Parsons, 3 Burr. 1805; Perkins, § 154; 2 Bl. Com. 291, 292; Lefevre *v.* Murdock, Wright (Ohio), 205; Concord B'k *v.* Bellis, 10 Cush. 277; Lowell *v.* Daniels, 2 Gray, 161; Perrine *v.* Perrine, 11 N. J. Eq. 144 (for the States where this rule is modified, see *ante*, note at the end of § 539); Cope *v.* Meeks, 3 Head, 388; Dow *v.* Jewell, 18 N. H. 355; Baxter *v.* Bodkin, 25 Ind. 172; Davis *v.* Andrews, 30 Vt. 681; Bressler *v.* Kent, 61 Ill. 426.

[5] Goodright *v.* Straphan, Cowp. 201.

[6] For the statutes, see *ante*, note at the end of § 539.

§ 2101. **Deeds of Married Women — Separate Property.** — In England, it seems, in equity, a married woman has full power of alienation of her estate if held to her sole and separate use, free from control of her husband.[1] In equity, a wife may charge her separate estate. But separate estates mean equitable estates, created by deed, devise, or marriage settlement, where the character is impressed by the instrument creating it.[2] But where the husband made a deed of land in right of his wife, which belonged to her, which was signed by her, and both acknowledged it, it was held not to convey her right. So, if they both join in conveying his right in an estate, it would not carry her separate estate in the premises, even though it contain covenants of title, since she is not bound by these, and is not estopped by them.[3] Neither fines nor recoveries, as a mode of conveying the interests of married women in real estate, were even in use in this country.[4] The tendency of modern legislation in the States has been to clothe married women with a power, more or less qualified, to convey their separate estates as if they were sole.[5] But unless executed according to the forms prescribed by statute, the conveyance is void;[6] nor does the fact that she has received the consideration and kept it, or induced the purchaser to make expensive improvements, suffice to pass the title.[7] When, however, the statute provides that she may convey as if *sole*, and does not prescribe any special formalities, her deed may be good, although as to the acknowledgment, or in other respects, it is informal.[8] It would be extending the treatment of the subject to an unreasonable extent to give here the laws of the various States as to what will be an effectual conveyance of the legal

[1] Hall *v.* Waterhouse, 13 Am. L. Reg. o. s. 759, 760 and note.

[2] Bressler *v.* Kent, 61 Ill. 426.

[3] Griffin *v.* Sheffield, 38 Miss. 393; Agricult. Bank *v.* Rice, 4 How. 225.

[4] Durant *v.* Ritchie, 4 Mason, C. C. 54; Jackson d. Woodruff *v.* Gilchrist, 15 Johns. 115; Albany Fire Ins. Co. *v.* Bay, 4 N. Y. 9; Cope *v.* Meeks, 3 Head, 388.

[5] For the statutes, see *ante*, note at the end of § 539.

[6] Morrison *v.* Wilson, 13 Cal. 498; Hepburn *v.* Dubois, 12 Pet. 375; Reaume *v.* Chambers, 22 Mo. 36, 54; McGlennery *v.* Miller, 90 N. C. 215; Innis *v.* Templeton, 95 Penn. St. 262.

[7] Innis *v.* Templeton, 95 Penn. St. 262; Daniels *v.* Mason, 90 Tex. 240; s. c. 38 S. W. Rep. 161.

[8] Roberts *v.* Wilcoxson, 36 Ark. 355.

title to the land of a married woman. The reader is referred to the compilation of the statutes given in another part of this work (*ante*, note at the end of § 539).

§ 2102. **Married Woman's Capacity as affected by Husband's Desertion.** — It seems that if a husband abjures the realm, as it is called, that is, remains out of the State, renouncing his connection with his wife, and residing abroad with an intention to remain, and abandon his country, it gives the wife a capacity to act as a *feme sole* in respect to her own estate.[1]

§ 2103. **Married Women's Deeds — The Form.** — It seems to be requisite that the deed should either contain proper words of grant, or declare the purposes for which she affixes her hand and seal. Thus a deed signed by a wife with her husband, without mentioning her therein as intending to grant or release anything, was held to be wholly inoperative as to her. The usual recital at the close of the clause in the deed, declaring the grantor's purpose in signing the same, — such as, "And A B, wife of said grantor, in token of relinquishing her right of dower in the premises," — would, if executed, be a sufficient release of dower, but would not pass her own estate without words of grant on her part.[2] If the land granted be hers, she must be joined with him in the operative words of the deed ;[3] in which case the grant will be effectual, though the husband be an alien.[4] And in New Hampshire and Mississippi, where the deed was of the wife's land, and made in her name, and signed by her as grantor, and was simply executed by the husband by annexing his signature and seal thereto and acknowledging the same, it was held to be a valid conveyance

[1] 4 Greenl. Cruise, Dig. 20 and note ; Gregory *v.* Pierce, 4 Met. 478 ; Abbot *v.* Bayley, 6 Pick. 89 ; Boyce *v.* Owens, 1 Hill (S. C.), 8 ; Buford *v.* Adair, 43 W. Va. 211 ; s. c. 27 S. E. Rep. 260.

[2] Stearns *v.* Swift, 8 Pick. 532 ; Melvin *v.* Proprs. Locks and Canals, 16 Pick. 137 ; Lufkin *v.* Curtis, 13 Mass. 223 ; Bruce *v.* Wood, 1 Met. 542 ; Catlin *v.* Ware, 9 Mass. 218 ; Learned *v.* Cutler, 18 Pick. 9 ; Lithgow *v.* Kavenagh, 9 Mass. 161 ; Frost *v.* Deering, 21 Me. 156 ; Cox *v.* Wells, 7 Blackf. 410 ; Purcell *v.* Goshorn, 17 Ohio, 105 ; Dundas *v.* Hitchcock, 12 How. 256 ; Raymond *v.* Holden, 2 Cush. 264 ; Agricultural Bank *v.* Rice, 4 How. 225 ; Cincinnati *v.* Newell, 7 Ohio St. 37 ; Jones *v.* Freed, 42 Ark. 357.

[3] Lithgow *v.* Kavenagh, 9 Mass. 173 ; Purcell *v.* Goshorn, 17 Ohio, 105 ; Dodge *v.* Nichols, 5 Allen, 548 ; Bartlett *v.* Bartlett, 4 Allen, 440.

[4] Whiting *v.* Stevens, 4 Conn. 44 ; Agricult. Bank *v.* Rice, 4 How. 225.

of her interest.[1] So, under the Gen. Stat. of Massachusetts, c. 108, § 3, a deed by a wife, of her estate, in her name, in the *testimonium* clause only of which the husband joined, and both executed it, was held to be a sufficient joining in the deed to make it effectual.[2] But where, in a deed of a wife's land, to which the husband was a party, there was a right of way over the husband's land appurtenant to hers mentioned in the deed, and a clause was inserted, "We convey all our right and title to said way," it was held to pass, on his part, the soil and freehold of the way, and on hers the easement of way.[3] It is sufficient in Massachusetts that the husband alone acknowledge the deed.[4] But in Kentucky, a deed by husband and wife of the wife's estate is inoperative as to her altogether, unless she shall have acknowledged the same.[5] In several of the States there are provisions, whereby married women may convey their estates where their husbands have deserted them, or are incapable of executing deeds, or have been committed to the State prison.[6]

§ 2104. **Married Woman's Deed — Power of Attorney.** — It is laid down unqualifiedly, in some of the States, that a married woman cannot make a valid power of attorney, even jointly with her husband, to make a deed of her interest.[7] But it is difficult to perceive any reason for the rule where she can do the principal thing herself; and such a right was clearly recognized by a statute in Massachusetts,[8] which is now, how-

[1] Elliot *v.* Sleeper, 2 N. H. 525; Woodward *v.* Seaver, 38 N. H. 29; Stone *v.* Montgomery, 35 Miss. 83. See also Ingoldsby *v.* Juan, 12 Cal. 564.

[2] Hills *v.* Bearse, 9 Allen, 406.

[3] Needham *v.* Judson, 101 Mass. 161.

[4] Catlin *v.* Ware, 9 Mass. 218.

[5] McCann *v.* Edwards, 6 B. Mon. 208.

[6] 4 Greenl. Cruise, 19, note.

[7] Earle *v.* Earle, 20 N. J. 347; Sumner *v.* Conant, 10 Vt. 9; Kearney *v.* Macomb, 16 N. J. Eq. 189; Holland *v.* Moon, 39 Ark. 120; Batte *v.* McCaa, 44 Ark. 398; Wright *v.* Blackwood, 57 Tex. 644. It is said in Hardenburg *v.* Lakin, 47 N. Y. 113, that a married woman could not make a power of attorney, and Bacon, Abr. Attorney, B, is cited; and the power to do so was created by statute. It is said by Field, J., in Holladay *v.* Daily, 19 Wall. 609, "In most of the States a married woman cannot, in the absence of statutory authority, execute, either alone or in company with her husband, a valid power of attorney to convey her interest in real property."

[8] Mass. Gen. Stat. c. 89, § 29. See Koch *v.* Briggs, 14 Cal. 262. See Roarty *v.* Mitchell, 7 Gray, 243; *ante*, § 425.

ever, repealed.[1] A similar right is also recognized by statute in New York.[2] In Delaware, she cannot execute a deed by attorney, although she was privately examined when she made and acknowledged the power.[3] In Indiana, though the courts hold that she could not acknowledge a deed by attorney, they waive the question, whether she can, in connection with her husband, create an attorney with power to convey her land.[4] In a case in Iowa, upon a similar state of facts, no question was made as to the validity of such a power; and in a case in the United States court from Iowa, the court assume a deed as a valid one which was executed by a *feme covert*, a trustee, by her attorney.[5] In Maine, the court seem to assume that she cannot make an attorney; though the case on which the opinion rests does not seem to warrant such a conclusion.[6] By a recent statute in California, she may make an attorney, if her husband joins in the appointment; but, unless he does, it will be void. But, in executing it, it is doubtful if the attorney would have to sign the husband's name as well as the wife's.[7] It seems to be well settled, that if a *feme sole* create an attorney, and then marry, it will revoke such power.[8] Nor can a *feme covert* join with the attorney of her husband in executing a deed of her land, so as effectually to pass her title to the same.[9]

§ 2105. **Married Woman's Deed to Husband.** — Although a married woman cannot convey directly to her husband, there does not seem to be any difficulty in her doing so by means of a conveyance to his use, if her husband join with her in the deed. Thus, where a husband and wife conveyed the wife's land to J. S., to the use of the husband and wife, their heirs and assigns, and the heirs and assigns of the longest liver of them, it was held to be a good feoffment to their use as joint-

[1] Stat. 1879, c. 86.

[2] Willard, Real Est. 269.

[3] Lewis *v.* Coxe, 5 Harring. 401.

[4] Dawson *v.* Shirley, 6 Blackf. 531.

[5] Wilkinson *v.* Getty, 13 Iowa, 157; Gridley *v.* Wynant, 23 How. 503.

[6] Allen *v.* Hooper, 50 Me. 373, citing Whitmore *v.* Delano, 6 N. H. 543.

[7] Dow *v.* Gould, etc. Mining Co., 31 Cal. 646; Dentzel *v.* Waldie, 30 Cal. 145, 150.

[8] Judson *v.* Sierra, 22 Tex. 365, 371; 2 Kent, Com. 645.

[9] Toulmin *v.* Heidelberg, 32 Miss. 268.

tenants, and that the statute would execute the seisin in them accordingly.[1] The wife may also do this by joining with her husband in a deed to a third person, and having a deed from such grantee made to the husband.[2]

§ 2106. **Married Woman's Deed — Her Covenants.** — Although a married woman is competent to join with her husband in executing a conveyance of her land, her covenants of warranty and of title, though in the same deed, are not binding upon her.[3] But her conveyance operates at common law, nevertheless, to estop her as to the title thereby granted.[4]

§ 2107. **Deeds of Insane Persons.** — A deed made by a person of non-sane mind, who has, for that cause, been placed under guardianship,[5] will be void and the same is true of the deed of a person under guardianship for incapacity to manage his affairs, though not in fact insane, even though done with the approbation of his guardian.[6] But the deed of an idiot, or insane person not under guardianship, passes a seisin, and is only regarded as voidable, and not void.[7] While in New York and Pennsylvania the deed of a *non compos* is void, in New Jersey it is voidable only.[8] And the acts and grants of infants

[1] Thatcher *v.* Omans, 3 Pick. 521.

[2] Meriam *v.* Harsen, 2 Barb. Ch. 267 ; Jackson d. Stevens *v.* Stevens, 16 Johns. 110 ; Todd *v.* Wickliffe, 18 B. Mon. 866.

[3] Jackson d. Clowes *v.* Vanderheyden, 17 Johns. 167 ; Grout *v.* Townsend, 2 Hill, 554 ; Perkins *v.* Richardson, 11 Allen, 539. By statute, she may bind herself by covenants in a deed made jointly with her husband. New Jersey, Pentz *v.* Simonson, 13 N. J. Eq. 234. Only bound by way of estoppel in Tennessee. Fletcher *v.* Coleman, 2 Head, 384. She is not bound in Michigan. Webb *v.* Holt, 113 Mich. 338 ; s. c. 71 N. W. Rep. 637. Otherwise in Minnesota. Bank *v.* Holmes, 68 Minn. 538 ; s. c. 71 N. W. Rep. 699, and probably in Vermont since 1888. Stat. 1894, § 44.

[4] Doane *v.* Willcut, 5 Gray, 328, 332 ; Colcord *v.* Swan, 7 Mass. 291. But not as to any title subsequently acquired by her. Schaffner *v.* Gruntzmacher, 6 Iowa, 137.

[5] Wait *v.* Maxwell, 5 Pick. 217 ; Rannells *v.* Gerner, 80 Mo. 474. See Pearl *v.* M'Dowell, 3 J. J. Marsh. 658.

[6] Griswold *v.* Butler, 3 Conn. 231.

[7] 2 Bl. Com. 291 ; Wait *v.* Maxwell, 5 Pick. 217 ; Allis *v.* Billings, 6 Met. 415 ; Arnold *v.* Rich. Iron Works, 1 Gray, 434 ; Ingraham *v.* Baldwin, 9 N. Y. 45 ; Eaton *v.* Eaton, 37 N. J. L. 108 ; Breckenridge *v.* Ormsby, 1 J. J. Marsh. 245 ; Irvine *v.* Irvine, 9 Wall. 626 ; Howe *v.* Howe, 99 Mass. 98 ; Copenrath *v.* Kienby, 83 Ind. 18.

[8] Van Deusen *v.* Sweet, 51 N. Y. 384 ; Matter of Desilver, 5 Rawle, 111 ; Eaton *v.* Eaton, 37 N. J. L. 108. Cf. Rogers *v.* Blackwell, 49 Mich. 192, that it is void.

and lunatics are regarded so far analogous to each other as to be governed by the same rules, and their deeds may be avoided as well against the grantees of their grantees as the grantees themselves.[1] It is often very difficult to define what degree of capacity in a grantor is sufficient to enable him to give a valid and effectual deed. The subject is treated of in Dennett *v.* Dennett, where the court say: "The question, then, in all cases where incapacity to contract from defect of mind is alleged, is not whether a person's mind is impaired, nor if he is afflicted by any form of insanity, but whether the powers of his mind have been so far affected by his disease as to render him incapable of transacting business like that in question." "Weakness of understanding is not, of itself, any objection to the validity of a contract, if the capacity remains to see things in their true relations, and to form correct conclusions." "When it appears that a grantor has not strength of mind and reason to understand the nature and consequences of his act in making a deed, it may be avoided on the ground of insanity."[2] A general finding of insanity by a commission appointed to try that question does not of itself avoid a deed.[3]

§ 2108. **Deeds of Infants.** — So, as the law seems to have been settled since the case of Zouch *v.* Parsons, the deed of an infant, ordinarily, is not void, but merely voidable;[4] although Mr. Preston, in the Touchstone, insists that the decision of that case has not been generally followed; and the statement, in his note to the work, is, "Deeds executed by infants are some-

[1] Hovey *v.* Hobson, 53 Me. 451, 456; Thompson *v.* Leach, 3 Mod. 310; Myers *v.* Sanders, 7 Dana, 524; Miles *v.* Lingerman, 24 Ind. 387.

[2] Dennett *v.* Dennett, 44 N. H. 538; Doe d. Short *v.* Prettyman, 1 Houst. 339.

[3] Jones *v.* Hughes, 15 Abb. N. C. 141.

[4] Zouch *v.* Parsons, 3 Burr. 1794, 1805; Perkins, § 154; 2 Blackst. Comm. 291, 292; Phillips *v.* Green, 3 A. K. Marsh. 11, holding the deed of an infant *feme covert* voidable; Tucker *v.* Moreland, 10 Pet. 58; Whitney *v.* Dutch, 14 Mass. 457, 462; Roof *v.* Stafford, 7 Cow. 180; Kendall *v.* Lawrence, 22 Pick. 540; Boston Bank *v.* Chamberlin, 15 Mass. 220; Breckenridge *v.* Ormsby, 1 J. J. Marsh. 245; Bool *v.* Mix, 17 Wend. 119; French *v.* McAndrew, 61 Miss. 187; Bingham *v.* Barley, 55 Tex. 281; Crawford *v.* Scovell, 94 Penn. St. 48. Nor can he avoid it till he is of age: *quære*, how far silence may be construed to be a ratification of such a deed? See Dearborn *v.* Eastman, 4 N. H. 441; Doe d. Moore *v.* Abernathy, 7 Blackf. 442; Kline *v.* Beebe, 6 Conn. 494; Wheaton *v.* East, 5 Yerg. 41; Wallace *v.* Lewis, 4 Harring. 75; Drake *v.* Ramsay, 5 Ohio, 252.

times void, and sometimes voidable."[1] The American cases, as a general thing, sustain the doctrine of the case of Zouch *v.* Parsons; and it is held, in several cases at least, that an infant, in order to avoid his deed, must do so within a reasonable time after coming of age.[2] But deeds, both of infants and *non compotes mentis*, may be ratified and established after coming of age, or being restored to reason, as the case may be. Their right of avoiding their deeds stands upon different ground from deeds obtained by fraud. In such cases, if the grantee in a fraudulent deed convey to an innocent purchaser, he holds by a good title; whereas, if they avoid their deeds, it defeats the title, even in a third person's hands. An insane person or infant need not restore the consideration before suing to recover back lands conveyed by him;[3] nor need one who claims under him by a deed made after majority.[4] But an infant cannot avoid a deed made by him while he remains an infant,[5] nor can any one but himself or his heirs call the deed in question; and a second deed, made during his minority, is no disaffirmance of the first.[6] If he die during his minority, his heirs may disaffirm the deed.[7]

§ 2109. **Deeds of Infants — Ratification.** — What shall be deemed to be a ratification of a deed, after the grantor's disability is removed, is far from being a settled question. Courts have differed irreconcilably in this matter. Thus it was held to be a ratification that the tenant was suffered to occupy, cultivate, and enjoy the estate for six years.[8] In another, doing this for nine years was held sufficient.[9] In another case, an acquiescence for four years, during which large improve-

[1] Shep. Touch. Prest. ed. 7, 56, and notes; Perkins, § 12; Co. Lit. 380 *b*.

[2] 2 Kent, Com. 236; Wallace *v.* Lewis, 4 Harring. 75. See Babcock *v.* Bowman, 8 Ind. 110; Richardson *v.* Boright, 9 Vt. 368.

[3] Hovey *v.* Hobson, 53 Me. 453, 457; Gibson *v.* Soper, 6 Gray, 279; Cresinger *v.* Welch, 15 Ohio, 156; St. Louis, Iron Mt. etc. Ry. Co. *v.* Higgins, 44 Ark. 293. *Contra*, Bingham *v.* Barley, 55 Tex. 281. It has, however, been held that the retention and spending of the consideration after the vendor has become of full age is an affirmance of the sale. Brantley *v.* Wolf, 60 Miss. 420.

[4] Eureka Co. *v.* Edwards, 71 Ala. 248.

[5] Welch *v.* Bunce, 83 Ind. 382.

[6] Emmons *v.* Murray, 16 N. H. 385.

[7] Sharp *v.* Robertson, 76 Ala. 343; Veal *v.* Fortson, 57 Tex. 482.

[8] Emmons *v.* Murray, *supra*; Robbins *v.* Eaton, 10 N. H. 561.

[9] Jackson d. Wallace *v.* Carpenter, 11 Johns. 539.

ments were made upon the premises without objection, was held to be a ratification.[1] It was held by the United States court that mere acquiescence by an infant, after coming of age, will not amount to an affirmance of a deed; yet there may be a ratification which will be an effectual affirmance, although it do not amount to as formal an act as is required to create a new title. And where the grantor, after coming of age, took a lease, as partner, of the land he had conveyed in his infancy, it was evidence from which a jury might find he intended to affirm his deed.[2] In Ohio, an entry suit or action, a subsequent conveyance, or any act unequivocally manifesting an intention to avoid a deed after coming of age, if done within the period of limitation of actions of ejectment, would disaffirm and avoid a deed made in infancy.[3] In Vermont, it is held that the infant, if he would avoid his deed made in infancy, must do it within a reasonable time after coming of age.[4] And in Connecticut, a neglect to disaffirm it within a reasonable time after coming of age is held to be sufficient evidence of ratification.[5] In Missouri, a grantor, after coming of age, expressed himself satisfied with the sale and promised to execute a confirmatory deed, but died before doing so, ten months after arriving at age. It was held to be a ratification.[6] In New York, where a ward, whose lands had been sold by his guardian while a minor, lay by eighteen years without making objection to the sale, it was held to be an affirmance of it.[7] Acquiescing thirteen years after arriving at age was held to confirm a sale made by an infant, although a female, and a part of the time under coverture, in Indiana.[8] And the rule, as stated in Massachusetts, is, "Any distinct and decisive act of recognition as a valid and subsisting contract is com-

[1] Wallace *v.* Lewis, 4 Harring. 75. See also Wheaton *v.* East, 5 Yerg. 41.

[2] Irvine *v.* Irvine, 9 Wall. 618.

[3] Drake *v.* Ramsay, 5 Ohio, 253, 254.

[4] Richardson *v.* Boright, 9 Vt. 371. See Eaton *v.* Eaton, 37 N. J. L. 108.

[5] Kline *v.* Beebe, 6 Conn. 506. So in Georgia, though the infant was a remainder-man and his estate did not come into possession within seven years from the time of the sale, it was held that a failure to disaffirm during that time ratified the conveyance. Nathans *v.* Arkwright, 66 Ga. 179.

[6] Ferguson *v.* Bell, 17 Mo. 347.

[7] Bostwick *v.* Atkins, 3 N. Y. 58.

[8] Hartman *v.* Kendall, 4 Ind. 403.

petent evidence of a ratification of it: a new delivery of a deed would not be requisite, as it would be if the deed were void.[1] On the other hand, it has been held, that mere silent acquiescence for any length of time short of the period of limitation would not ratify such a deed.[2] A person is not excused from disaffirming his deed by the fact that after he comes of age he is a remainder-man, or the land is in possession of a widow by her dower estate.[3] In some States, a *feme covert* is not obliged to disaffirm while coverture continues.[4] Though a deed made under the direct influence of an insane delusion would be invalid as a disposition of property, if, after becoming sane, the grantor were to accept the consideration for which he had made such deed, and this is done intelligently, it would be a ratification of the same.[5] One mode of disaffirming and avoiding a deed, after the disability of the grantor is removed, is by giving a new deed; and, if the same be recorded, no parol ratification of the first deed, subsequently made, can avail to give it precedence of the second deed.[6] On the other hand, if one of full age makes a deed in which he recites a mortgage made by him during infancy, he affirms the mortgage.[7] In some of the States, the deed of a married woman, if an infant, is void, although she join with her husband in executing it.[8] In others it is voidable.[9] And she may avoid it even against the grantee of

[1] Howe *v.* Howe, 99 Mass. 98. Such as bringing an action. St. Louis, Iron Mt., etc. Ry. Co. *v.* Higgins, 44 Ark. 293.

[2] Hovey *v.* Hobson, 53 Me. 453; Cresinger *v.* Welch, 15 Ohio, 156; Wells *v.* Seixas, 24 Fed. Rep. 82; Birch *v.* Linton, 78 Va. 584.

[3] Nathans *v.* Arkwright, 66 Ga. 179; Long *v.* Williams, 74 Ind. 115.

[4] Sims *v.* Everhardt, 102 U. S. 300; Richardson *v.* Pate, 93 Ind. 423; Wilson *v.* Branch, 77 Va. 65.

[5] Bond *v.* Bond, 7 Allen, 1.

[6] Black *v.* Hills, 36 Ill. 379; Bond *v.* Bond, 7 Allen, 1; Jackson d. Brayton *v.* Burchin, 14 Johns. 124; Tucker *v.* Moreland, 10 Pet. 75; Jackson d. Wallace *v.* Carpenter, 11 Johns. 541; Haynes *v.* Bennett, 53 Mich. 15. Thus, a quitclaim deed by one of full age avoids a warranty deed made by him during his infancy, Bagley *v.* Fletcher, 44 Ark. 153, but does not avoid a mortgage made during minority, Singer Man. Co. *v.* Lamb, 81 Mo. 221.

[7] Losey *v.* Bond, 94 Ind. 67.

[8] Chandler *v.* McKinney, 6 Mich. 217; Adams *v.* Ross, 30 N. J. 513; Schrader *v.* Decker, 9 Penn. St. 14; Cason *v.* Hubbard, 38 Miss. 35. See *post*, § 2436, as to what is infancy in some States.

[9] Greenwood *v.* Coleman, 34 Ala. 155; Wilson *v.* Branch, 77 Va. 65.

the grantee named in her deed.[1] She may disaffirm her grant even while yet an infant, and though her husband refuses to join in such disaffirmance. But her lying by, after coming of age for ten years, she being still covert, was held not to be an affirmance of her deed, there having been no considerable improvements made upon the land in the mean time."[2] And it has been held that lying by for thirty-two years after majority, coverture existing during all that time, does not ratify such a conveyance.[3] On the other hand, a delay of three years and a half has been held to ratify the deed.[4]

§ 2110. **Deeds of Aliens.** — Aliens, too, are embraced in the Touchstone, in the category of persons who cannot convey lands. But it seems to be well settled, that, even at common law, an alien may purchase and hold land against all the world but the king, and may, with the same limitation, convey the same.[5] And this disability is wholly removed in many of the States by statute.[6]

§ 2111. **Deeds procured by Fraud, voidable.** — If one is induced, by the fraud of the grantee, to execute a deed, it is voidable, but not void. The grantor may, by restoring the consideration, rescind the contract, if done within a reasonable time after discovering the fraud, but not otherwise.[7]

§ 2112. **Deeds executed under Duress, voidable.** — If one makes a deed under duress of imprisonment, or fear from threats of personal injury, it is a voidable, but not a void, instrument.[8] To constitute such a duress as will avoid a deed, there must be an apprehension of the loss of life or limb, or personal liberty. The fear of a battery, or having

[1] Miles *v.* Lingerman, 24 Ind. 387; Markham *v.* Merrett, 7 How. (Miss.) 437; Buchanan *v.* Hubbard, 96 Ind. 1.

[2] Miles *v.* Lingerman, *supra*.

[3] Wilson *v.* Branch, 77 Va. 65. So of twenty-one years. Richardson *v.* Pate, 93 Ind. 423. Cf. Sims *v.* Bardoner, 86 Ind. 87.

[4] Goodnow *v.* Empire Lumber Co., 31 Minn. 468.

[5] 2 Bl. Com. 293; Shep. Touch. 56; Burk *v.* Brown, 2 Atk. 399; 1 Wood, Conv. 138.

[6] *Ante*, § 132.

[7] Bassett *v.* Brown, 105 Mass. 551.

[8] 2 Bl. Com. 291, 292; Worcester *v.* Eaton, 13 Mass. 371; Deputy *v.* Staple-ford, 19 Cal. 302; Fisk *v.* Stubbs, 30 Ala. 335, deed of wife set aside, which she executed under threat of husband.

one's house burned, is not sufficient. Mere threatening a lawsuit is no duress.[1] But in Minnesota, a wife was admitted to show that she signed a deed under threats of her husband that he would abandon her if she did not do it, and would not support her; and thereby she was allowed to avoid her deed. Threats of personal injury would not be requisite.[2] But in a similar case, where the coercion was the threat of the husband to leave the wife, and she made no mention of the coercion to the grantee until seven years afterwards, it was held that the deed should not be set aside on the ground of coercion.[3] The cases, however, do not agree upon the measure of intimidation which would avoid a deed. The civil law required that it should be such as is capable of making an impression upon a person of courage only. Pothier says regard should be had to the age, sex, and condition of the parties. In New York, it was held that a deed obtained from a wife by threats of a criminal prosecution against her husband, and of arresting and imprisoning him upon such a charge, by which she was greatly excited and alarmed, might be avoided.[4] It is well settled that duress exercised upon a husband by threats of injury to his wife will avoid his deed, and *vice versa*, as to the wife; and the rule has been held to cover the relations of parent and child, so that threatened harm to one will avoid the deed of the other.[5] The United States court state the rule thus: "Unlawful duress is a good defence, if it includes such a degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness."[6] But it has been insisted that this rule is too restricted, and that each case should rest upon its own merits.[7]

§ 2113. **Deeds of Joint-tenants and Tenants in Common.** — There is a qualified disability to convey lands, on the part of

[1] Evans *v.* Gale, 18 N. H. 401.

[2] Tapley *v.* Tapley, 10 Minn. 460. And to the same effect are Kocourek *v.* Marak, 54 Tex. 201 ; Line *v.* Blizzard, 70 Ind. 23.

[3] Bouldin *v.* Reynolds, 58 Md. 491.

[4] Eadie *v.* Slimmon, 26 N. Y. 12, 14.

[5] Shep. Touch. 61 ; Harris *v.* Carmody, 131 Mass. 51.

[6] United States *v.* Huckabee, 16 Wall. 432.

[7] 23 Am. L. Reg. o. s. 206.

joint-tenant and tenants in common, which it is proper to notice in this connection. As each owner, in such a case, is seised of an undivided share of every part, and has, moreover, as an incident to such an ownership, a right to have his own share set out from every other share by a process of partition, neither owner can convey his interest in any particular part of the common estate, if objected to by his co-tenant; for, if he may do so as to one part, he may do so to an indefinite number, and thereby compel his co-tenant to become tenant in common of these several parcels with these several grantees, and to have a separate process of partition with each of these owners, thereby greatly reducing the value of his estate. Such a conveyance of the personal interest of a tenant, however, would be good as to all persons except his co-tenants, and, if not objected to by them, will be valid and effectual to all intents. If they do not dissent for a long time, their assent will be presumed. In some of the States, a different rule prevails, as may be seen by reference to a former part of this work, where the whole subject is treated of.[1] And in one other respect, such joint-tenant or tenant in common cannot, by his separate deed, affect the joint property belonging to him and his co-tenant; and that is by creating thereby a servitude upon the common property in favor of a stranger. A grant to that effect would be void so far as the rights of his co-tenant were concerned.[2] Nor can one of several trustees, in other than charity or public trusts, convey a separate or aliquot part of the estate held in trust. Such deed would be void.[3] In respect to the right of one of several partners to convey partnership lands by a deed in the name of the company, but executed by himself alone, the common law seems to be clear, that it can only affect his own share and interest in such land, and will not pass the interest of his partners.

[1] Great Falls Co. *v.* Worster, 15 N. H. 449; Whitton *v.* Whitton, 38 N. H. 127; Smith *v.* Benson, 9 Vt. 138; McKey *v.* Welch, 22 Tex. 390; Porter *v.* Hill, 9 Mass. 34; Blossom *v.* Brightman, 21 Pick. 284; Phillips *v.* Tudor, 10 Gray, 78; Campau *v.* Godfrey, 18 Mich. 27; Butler *v.* Roys, 25 Mich. 53; Good *v.* Coombs, 28 Tex. 51; Markoe *v.* Wakeman, 107 Ill. 251; Goodwin *v.* Keney, 49 Conn. 563; Crook *v.* Vandevoort, 13 Neb. 505; Camoron *v.* Thurmond, 56 Tex. 22.

[2] Collins *v.* Prentice, 15 Conn. 423; Marshall *v.* Trumbull, 28 Conn. 183; Washb. Easements (3d ed.), 41.

[3] Chapin *v.* First Univ. Soc., 8 Gray, 583.

Nor will any ratification subsequently made by them give effect to the deed, unless it be by an instrument of as high a nature as the deed itself.[1] But the court of Iowa were inclined to regard a parol ratification, in such a case, as giving effect to the deed as to those who thus ratify it.[2]

§ 2114. **Deeds of Corporations.** — Corporations authorized to hold real estate are competent to convey the same; but, in so doing, they must conform to the mode pointed out by their charter and by-laws. It must be the act and deed of the corporation as an entity. A deed signed by every individual member of a corporation would not convey the corporate right or title to land.[3] And it is laid down unqualifiedly, that, if a railroad corporation acquire land by deed granting a fee, it may convey the same by deed.[4]

§ 2115. **Names of Grantor and Grantee.** — The object of names being merely to distinguish one person from another, it seems to be sufficient if this is effected, though the true name of the party be not used, or even no name at all. The general principle of law is, *id certum est quod certum reddi potest;* and a man may be described by his office or his relationship to a known person.[5] A deed to A *or* his heirs is good, because, if A is alive, he has no heirs; and, if dead, his heirs can be ascertained *aliunde*.[6] So a deed to "A, B, and others, heirs of E F," is a good deed to all who answer to that description, though not named.[7] A deed with the name *Edward* written in it as grantor, but signed *Edmond*, and acknowledged in the name of *Edward*, was held to be a good deed of Edward, who, at its date, was the owner of the

[1] Story, Part. §§ 119, 121; Gow, Part. 75, 76; Parsons, Part. 369.

[2] Haynes *v.* Seachrest, 13 Iowa, 455.

[3] Wheelock *v.* Moulton, 15 Vt. 519; Pratt *v.* Bacon, 10 Pick. 123; Ang. & Ames, Corp. § 221.

[4] Yates *v.* Van de Bogert, 56 N. Y. 530.

[5] Broom, Max. 482; 1 Wood, Conv. 160, 164, 171; Co. Lit. 3 *a*; Perkins, §§ 36, 54, 55; Dr. Ayray's case, 11 Rep. 20, 21; Counden *v.* Clerke, Hob. 32 *a*; Sir Moyle Finch's case, 6 Rep. 65; Hoffman *v.* Porter, 2 Brock. 156, where a deed to P. H. & Son, they being partners, was held good to both; Morse *v.* Carpenter, 19 Vt. 613. *Contra*, Arthur *v.* Weston, 22 Mo. 378, impugning Hoffman *v.* Porter; Shaw *v.* Loud, 12 Mass. 447. One "to heirs of A B" was held good, he being dead; Boone *v.* Moore, 14 Mo. 420.

[6] Ready *v.* Kearsley, 14 Mich. 225; Hogan *v.* Page, 2 Wall. 607.

[7] Cook *v.* Sinnamon, 47 Ill. 214.

estate.[1] But a deed naming Hiram as grantor, and acknowledged, as appears by the certificate, by Hiram, but signed by Harmon, if unexplained, will not be considered as executed by the grantor.[2] Where several persons were named as grantors in the deed, and one who was interested in the estate, but not named in the deed, signed it with the others, it was held not to be his deed or to bind him.[3] Where an estate is given expressly in trust for some person or corporation, there is the same necessity of inserting the name of the *cestui que trust* as if the grant was intended to be to him. Thus a grant to A, B, and C, *trustees* of an unincorporated association, was held to be void, there being no such *cestui que trust* known to the law.[4] But a deed to A, B, and C, as officers of an unincorporated association, conveyed the estate to them. They alone can convey it, and the members of the association have no control over it.[5] And, in the following cases, a grant to A, B, and C, trustees of a society named, their heirs, etc., was held to be a grant to them individually.[6] So a deed to the selectmen or overseers of the poor of a town, and their successors, is to them individually.[7] A deed to L. B. and Company vests the estate in L. B. alone.[8] But the partner named would, it seems, hold in trust for his copartner as well as himself.[9] If the intended grantee be not named, he should be ascertained by description, so as to be distinguished from all others; and any uncertainty in this respect will render the grant void.[10] Thus a grant to the inhabitants of a neighborhood which is not defined with certainty and ascertained limits would be void; but if made to

[1] Middleton *v.* Findla, 25 Cal. 80; Tustin *v.* Faught, 23 Cal. 237.

[2] Boothroyd *v.* Engles, 23 Mich. 21.

[3] Peabody *v.* Hewett, 52 Me. 50.

[4] German Land Assoc. *v.* Scholler, 10 Minn. 331.

[5] Austin *v.* Shaw, 10 Allen, 552.

[6] Towar *v.* Hale, 46 Barb. 361; Den d. Cairns *v.* Hay, 21 N. J. L. 174; Brown *v.* Combs, 29 N. J. L. 36.

[7] Norton *v.* Leonard, 12 Pick. 158; Newhall *v.* Wheeler, 7 Mass. 189.

[8] Winter *v.* Stock, 29 Cal. 411; Gossett *v.* Kent, 19 Ark. 607; Moreau *v.* Saffarans, 3 Sneed, 595.

[9] Arthur *v.* Weston, 22 Mo. 378; Jackson d. Potter *v.* Sisson, 2 Johns. Cas. 321; Beaman *v.* Whitney, 20 Me. 420.

[10] Simmons *v.* Spratt, 20 Fla. 495.

the inhabitants of a certain defined district who are not incorporated, and their successors, the same may create in the then actual residents there a life-estate in the thing granted, but nothing passes to their successors who may thereafter reside there.[1] And where the Christian name of the grantee was left blank in a deed, it was held competent for him to show who was intended by proof *aliunde*, he being in possession of the deed.[2] In the case before cited of Morse *v.* Carpenter, the deed was to M. & H., who were partners, but their surnames were omitted.[3] And this applies also to corporations.[4] Thus a grant to a corporation which has never been created or organized would be void for want of a grantee. It might be different if the defect consisted simply in organizing the corporation.[5] It is sufficient if the person be described by the character ascribed to him by general repute, though this be not accurate in point of facts; as a grant to the wife of B, where the person intended to be designated lives with him, and is generally reputed his wife, though never lawfully married to him. So the name by which a man is habitually called is sufficient, though different from that of his baptism.[6] So calling the party the *senior*, when the *junior* of the same name, or *vice versa*, is intended.[7] But a deed to a fictitious person would be simply void.[8] A grant by or to a person by a surname only, without something in the deed to show who is intended, would be void for uncertainty.[9] And it may be laid down as a rule, that a grant, to be valid, must be to a corporation or some person certain named, who can take by force of the grant, and who can hold either in his own right or as a trustee.[10]

[1] Thomas *v.* Marshfield, 10 Pick. 367, 368.

[2] Fletcher *v.* Mansur, 5 Ind. 269.

[3] 19 Vt. 615.

[4] Dr. Ayray's case, 11 Rep. 21.

[5] Harriman *v.* Southam, 16 Ind. 190; Russell *v.* Topping, 5 McLean, C. C. 202; Jones *v.* Cincinnati Type Foundry Co., 14 Ind. 89.

[6] Counden *v.* Clerke, Hob. 32 *a*; Sir Moyle Finch's case, 6 Rep. 65; 1 Wood, Conv. 160, 161.

[7] 1 Wood, Conv. 161; Perkins, § 37.

[8] Muskingum Val.T. Co. *v.* Ward, 13 Ohio, 120.

[9] 1 Wood, Conv. 162; Shep. Touch. 53; Fanshaw's case, F. Moore, 229.

[10] Jackson d. Cooper *v.* Cory, 8 Johns. 388; Hornbeck *v.* Westbrook, 9 Johns. 74.

§ 2116. **Same Subject — Estoppel.** — And if a man execute a deed, calling himself therein a certain name, he will not be admitted to take advantage of the fact that it is not his true name.[1] So where there was a mistake in the names of lessees, and they enter under it, though they do not sign it, they would be estopped to deny that they were rightly named in the lease.[2]

§ 2117. **Same Subject — Mistake in Grantee's Name.** — The law knows but one Christian name; and the omission of a middle name, or its initial, does not affect the execution of a deed.[3] So it is immaterial that there is a mistake in the Christian name, if the deed explains who is intended. A deed to Robert, Bishop of E., will be good, though his real name is Roland.[4] [And in any case, the real name of the intended grantee may be shown by parol evidence if there is no patent ambiguity.[5]]

§ 2118. **Same Subject — Patent Ambiguity.** — But the deed itself must not create the uncertainty as to who is the grantee intended; as, if a grant be made to A B *or* C D, it would be void as to both.[6]

§ 2119. **Same Subject — Distinction between Present Estates and Remainders.** — So no person can take under a deed where the grant purports to be of a present estate, unless he is named in the deed as a party to it; though a remainder may be limited to one who is not a party to the deed, or even to a person not *in esse*.[7] And a deed to a person not then living, and his heirs, would be void, since, the word "heirs" being a word of *limitation*, and not of *purchase*, there is no person to take under it.[8]

§ 2120. **Of Grantor's Name in Body of Deed.** — It was once thought that the grantor should be named as such in the deed. But this does not seem to be necessary if the grantor signs it. Thus, where a deed purported to be that of a married woman,

[1] Com. Dig. Fait, B. 1.

[2] Felton *v.* Hamilton, 6 Nev. 196.

[3] Games *v.* Stiles, 14 Pet. 322; Franklin *v.* Talmadge, 5 Johns. 84; Dunn *v.* Games, 1 McLean, C. C. 321.

[4] 1 Wood, Conv. 172; Perkins, § 36.

[5] Salmer *v.* Lathrop, 10 S. Dak. 216; s. c. 72 N. W. Rep. 570.

[6] 1 Wood, Conv. 171.

[7] Hornbeck *v.* Westbrook, 9 Johns. 73.

[8] Hunter *v.* Watson, 12 Cal. 363.

her name only appearing as grantor, but it was signed by her and her husband, who acknowledged it, it was held to be a good grant of the husband as well as the wife.[1]

§ 2121. **Parties must be in esse.** — There must be a person *in esse* to give as well as to receive a conveyance, in order to make a deed of an immediate estate, by or to such person, good.[2] And if there is any reasonable doubt of such person being *in esse* at the time of the delivery of the deed, it must be affirmatively shown that he was so, in order to give the deed validity.[3]

§ 2122. **Rule not applicable to Remainders.** — This principle does not apply to remainders, provided there is some ascertained person *in esse* to take the immediate particular estate which is to sustain the remainder till the person who is to take shall come *in esse*. But if the grant *in præsenti* be to a person not *in esse*, or not ascertained, and a remainder be limited to another not *in esse*, both will be void.[4] So a grant *in præsenti* to the oldest son of J. S., who has no son when the deed is delivered, derives no validity from the subsequent birth of a son to J. S.[5] So a deed to the heirs of J. S., who is alive, would be void;[6] unless there is something in the deed itself which shows that by "the heirs" was meant *the children* of the person named, when the grant may be good. But the court limit this to that of which livery may be made, and do not extend it to incorporeal hereditaments.[7]

§ 2123. **Capacity of Grantee.** — The capacity to take as grantee is much less restricted than that required to make a grant. Persons *non compotes mentis*, married women, infants, corporations, and bodies politic, may take as grantees.[8]

[1] Elliot *v.* Sleeper, 2 N. H. 525; Perkins, § 36; Co. Lit. 6 *a*; Lord Say and Seal's case, 10 Mod. 46. *Contra*, Adams *v.* Medsker, 25 W. Va. 127. But see Catlin *v.* Ware, 9 Mass. 218.

[2] 1 Wood, Conv. 161, 170; Miller *v.* Chittenden, 2 Iowa, 368. See also the same case as to how far grants to charitable uses form exceptions to this rule.

[3] Hulick *v.* Scovil, 4 Gilm. 191.

[4] 1 Wood, Conv. 170, 172; Perkins, § 53.

[5] 1 Wood, Conv. 170.

[6] Hall *v.* Leonard, 1 Pick. 27; Morris *v.* Stephens, 46 Penn. St. 200.

[7] Huss *v.* Stephens, 51 Penn. St. 282. See Lisle *v.* Gray, 2 Levinz, 223.

[8] Wood, Conv. 165, 169; Perkins, § 51; Co. Lit. 2 *b*, 3 *b*. See Sutton First Par. *v.* Cole, 3 Pick. 232; Concord Bank *v.* Bellis, 10 Cush. 278. As to effect of

§ 2124. **Same Subject — Corporations.** — There are, and from an early date have been, statutes in England, called those against mortmain, which prohibit corporations, without special authority, to hold lands. But, with the exception of Pennsylvania, it is believed that similar statutes have not been adopted in this country. It is usual, however, to insert a clause in acts creating corporations, limiting the amount of estate which they may hold. But if a corporation exceeds this prescribed amount by an original purchase, nobody but the State can interfere with its holding the property thus acquired; and if its property, by its rise in value, comes to exceed the amount prescribed in its charter, its title will not thereby be impaired.[1] If a deed be made to several as tenants in common, a part only of whom are competent to take by the deed, it will be good as to their respective shares to such as are competent, though void as to the others.[2]

§ 2125. **The Execution.** — This, as stated by Lord Coke, consists of *sealing* and *delivery*. And this was all that was required by the common law; though it was always deemed desirable that the deed should be signed, and the signature accompanied by the attestation of witnesses, both of which are specially required by the statutes of several of the States.

husband dissenting to wife accepting deed, Melvin *v.* Proprs. Locks, etc., 16 Pick. 167.

[1] Kent, Com. 282, 283; Bogardus *v.* Trin. Ch., 4 Sandf. Ch. 633, where, from £30 income per year, the property had grown to $300,000 per annum.

[2] Shep. Touch. Prest. ed. 71. See Chamberlain *v.* Bussey, 5 Me. 164.

CHAPTER XCVIII.

TITLE BY PRIVATE GRANT — EXECUTION OF DEEDS.

§ 2126. Signing at common law.
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2189. Deeds-poll.
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§ 2126. **Signing at Common Law.** — At common law, signing, as a part of the execution of a deed, is unnecessary, though always advisable.[1]

§ 2127. **Signing in this Country.** — When the laws and usages of the different States in this respect are examined, they will be found to have varied from time to time. Thus the only requisites to a good conveyance of lands in Kentucky were, formerly, that it should be in writing, sealed and delivered;[2] though, in another case, signing was recognized as a part of what constitutes a conveyance.[3] But as the statute of frauds in that State requires certain instruments like leases to be signed, and the statutes of 1843 and of 1860 dispense with seals in the conveyance of land, it is presumed signing would now be regarded as indispensable.[4] So far as this was once

[1] Wood, Conv. 238; Termes de la Ley, "Fait;" Com. Dig. Fait, B. 1; Wms. Real Prop. 126; Shep. Touch. Prest. ed. 56, and note, 60; *contra*, 2 Bl. Com. 306.

[2] Sicard *v.* Davis, 6 Pet. 124; Plummer *v.* Russell, 2 Bibb, 174.

[3] Chiles *v.* Conley, 2 Dana, 21.

[4] Thornt. Conv. 223; 1 Ky. St. 1894, c. 29.

doubtful in New Hampshire, it is now made certain by a statute requiring deeds to be signed.[1] Signing is essential in many of the States (see note at the end of chapter c.). It is provided by statute in most States that affixing a mark by the grantor against his name, though written by another, is *signing*, although it do not appear that he could not write his own name.[2]

§ 2128. **Seal necessary at Common Law.** — The sealing of deeds was indispensably necessary at common law, in order to their validity, at least after the time of Edward III.[3] This was the rule also, at common law, in the United States generally. By statute now, however, in many States, the affixing of seals by individuals in the execution of deeds is unnecessary.[4] In many of these States, corporations are still required to execute the deeds with their corporate seal.[5] By *deeds*, as the word is here used, are intended such as purport to convey a freehold interest.[6] Therefore, calling an instrument a deed, or delivering it as such, or believing or intending it to be such, will not make it a deed without a seal actually affixed thereto.[7]

§ 2129. **Not necessary to recite the Seal.** — On the other hand, if there be a seal affixed, it is a deed, though it lack the usual recital that the party has set his seal thereto; or though the recital be that he has thereunto set his hand, without mentioning his seal,[8] illustrating thereby the maxim, *in tra-*

[1] Elliot *v.* Sleeper, by Woodbury, J., 2 N. H. 529; Thornt. Conv. 364.

[2] Mass. Pub. Stat. c. 3, § 3; Truman *v.* Lore, 14 Ohio St. 154; Baker *v.* Dening, 8 Ad. & El. 94.

[3] 1 Wood, Conv. 192.

[4] See note *post*, at the end of chapter c.

[5] See note at the end of chapter c.

[6] Cline *v.* Black, 4 M'Cord, 431; Blackw. Tax Tit. 432; Jackson d. Gouch *v.* Wood, 12 Johns. 73; Jackson d. Wadsworth *v.* Wendell, id. 355; McCabe *v.* Hunter, 7 Me. 355; Underwood *v.* Campbell, 14 N. H. 393; 2 Bl. Com. 297; id. 312.

[7] Warren *v.* Lynch, 5 Johns. 239; Taylor *v.* Glaser, 2 Serg. & R. 502; Wadsworth *v.* Wendell, 5 Johns. Ch. 224; Davis *v.* Brandon, 1 How. (Miss.) 154; Long *v.* Long, Morr. (Iowa) 43; Deming *v.* Bullitt, 1 Blackf. 241; Davis *v.* Judd, 6 Wis. 85; Alexander *v.* Polk, 39 Miss. 737.

[8] 1 Wood, Conv. 192, 238; Shep. Touch. 55; Com. Dig. Fait, A. 2, B. 3; Taylor *v.* Glaser, 2 Serg. & R. 502; Peters *v.* Field, Hetl. 75; Bradford *v.* Randall, 5 Pick. 496; Mill Dam Foundery *v.* Hovey, 21 Pick. 417, 428.

ditionibus chartarum non quod dictum sed quod factum est inspicitur.[1]

§ 2130. **Affixing a Seal makes a Deed.** — It is immaterial who affixes the seal, whether a party to the deed, or the scrivener, or a stranger, provided it be done before the deed is delivered. By delivering it as his deed, the maker adopts the seal.[2] And it is competent for any number of grantors to adopt and make use of one and the same seal, and thereby adopt it as the seal of each.[3] If a deed be prepared for several to execute, and only a part of them seal it, it will be good as their deed, provided it be properly delivered by such as have signed it, but will not bind those who do not execute it.[4] If it is signed by all, and declares that the grantors affixed their seals, but there are not as many seals as names, some of the signers are presumed to have adopted the seals of others.[5]

§ 2131. **Sealing by Corporations.** — A corporation ordinarily binds itself by its seal; and many if not all corporations are authorized to have and use a common seal. In many of the States, which have abolished the use of private seals, it is still necessary for a corporation to seal its deed with its corporate seal.[6] But a deed of a corporation may be good, though sealed with any seal other than their own common seal, if adopted and used by such corporation, and though it be not alleged in the executing clause of the deed that it is their common seal.[7] An impression made upon an instrument to be executed by a

[1] State *v.* Peck, 53 Me. 299.

[2] 1 Wood, Conv. 192; Co. Lit. 6 *a*; Elwell *v.* Shaw, 16 Mass. 42, 47; Shep. Touch. Prest. ed. 54, 57.

[3] 1 Wood, Conv. 192; Perkins, § 134; Com. Dig. Fait, A. 2; Shep. Touch. Prest. ed. 57; Warren *v.* Lynch, 5 Johns. 239; Mackay *v.* Bloodgood, 9 Johns. 285; Bradford *v.* Randall, 5 Pick. 496; Tasker *v.* Bartlett, 5 Cush. 359, 364; Lambden *v.* Sharp, 9 Humph. 224; Atlantic Dock Co. *v.* Leavett, 54 N. Y. 35; Warder, Bushnell, & G. Co. *v.* Stewart, 2 Marv. (Del.) 275; s. c. 36 Atl. Rep. 88.

[4] Shep. Touch. 71; Scott *v.* Whipple, 5 Me. 336; Colton *v.* Seavey, 22 Cal. 501; Jackson *v.* Stanford, 19 Ga. 14.

[5] Burnett *v.* McCluey, 78 Mo. 676.

[6] See *post*, note at the end of chapter c.

[7] 1 Wood, Conv. 192; Com. Dig. Fait, A. 2; Shep. Touch. 57; Mill Dam Foundery *v.* Hovey, 21 Pick. 417, 428; Ang. & Am. Corp. § 226. See Stebbins *v.* Merritt, 10 Cush. 27, 34, by which it would seem, that, if the corporation have adopted a common seal of a particular character or device, it should be used to make a valid deed. See also Koehler *v.* Black River Falls Iron Co., 2 Black, 715.

corporation, by a stamp, may be a good corporate seal, although no other substance is interposed to receive it.[1] But a facsimile of a seal printed on a blank form of a deed of a corporation does not become a seal by filling up the deed.[2] Signing as well as sealing is essential to the validity of a deed by a corporation, though held otherwise by some of the cases in New York as in England.[3] And, as held by the United States court, not only must such deed be sealed with the corporate seal, but the seal must be placed there by some one duly authorized to affix it. A deed purporting to be the deed of a corporation, under its seal, affixed by its president, duly thereto authorized, and acknowledged to be the free act of the corporation, and signed by the president by its authority, is executed properly.[4] And it is competent to impeach a deed bearing a corporate seal by showing that it was placed there by some person unauthorized to affix it.[5]

§ 2132. **What constitutes a Seal.** — In respect to what will answer as a seal for a deed, a diversity exists. In some States, it is required to be some adhesive substance applied to the material on which the deed is written. In others, a scroll or figure made with a pen upon such material by the one who signs such instrument is deemed to be a seal. But a seal, such as is known to the common law, is defined to be an impression upon wax or some tenacious substance capable of being impressed, "whether it be a wafer, or any other paste or matter sufficiently tenacious to adhere and receive an impression."[6] "It is required," according to Lord Coke, "that the deed, charter, or writing, must be sealed, that is, have some impression upon the wax; for *sigillum est cera impressa, quia cera sine impressione non est sigillum*, and no deed, charter, or writing, can have the force of a deed without a seal."[7] The subject is considered by the United States

[1] Hendee *v.* Pinkerton, 14 Allen, 381, 387; Royal Bank of Liverpool *v.* Grand Junct. R. & D. Co., 100 Mass. 444. See also Pub. Stat. c. 3, § 3, divis. 19.

[2] Bates *v.* Boston & N. Y. Cent. R. R. Co., 10 Allen, 251.

[3] Isham *v.* Bennington Iron Co., 19 Vt. 252.

[4] Murphy *v.* Welch, 128 Mass. 489.

[5] Koehler *v.* Black River Falls Iron Co., 2 Black, 715.

[6] Warren *v.* Lynch, 5 Johns. 239; Bradford *v.* Randall, 5 Pick. 496; Tasker *v.* Bartlett, 5 Cush. 359, 364.

[7] 3d Inst. 169.

Supreme Court in Pillow *v.* Roberts, where it was held, that an impression of a seal on paper would be a good sealing, at least of a public deed.[1] In England, a scroll with a pen does not make a deed, though it does in Jamaica.[2] But where a deed was sent out from England to Melbourne to be executed, with pieces of ribbon attached to the places where it was intended to have the seals, and it was executed all but annexing wax to those ribbons, and attested or signed and sealed, and also acknowledged, it was held to be *prima facie* evidence of a sufficient sealing of the deed.[3] [The law of the various States, both as to the requirement of a seal and as to what constitutes a seal, will be found in the compilation of statutes contained in a note at the end of chapter c.]

§ 2133. **Attestation.** — In some States, in order to establish the fact that a deed has been executed by the party by whom it purports to have been done, it is necessary that there should be witnesses of the fact. It is customary to append to the deed a certificate to that effect, and that the witnesses subscribing the same attested such execution. At common law, this attestation was not required in order to give validity to the deed,[4] nor is it necessary in several of the States;[5] while in others a deed is invalid, unless attested by one or more witnesses, according to the statute requirements of the State in which the deed is executed or to take effect.[6] But in Vermont, if a deed have but one subscribing witness, it may be used in evidence in a court of equity in a process to compel the grantor to perform a specific contract to convey by a sufficient deed.[7] But in Michigan, where two witnesses are required, a deed attested by one only would have no effect to convey the land.[8] In some of the States, there is a necessity

[1] Pillow *v.* Roberts, 13 How. 473.

[2] Adam *v.* Kerr, 1 Bos. & P. 360.

[3] *In re* Sandilands, L. R. 6 C. P. 411.

[4] 1 Wood, Conv. 239; 2 Bl. Com. 307; Com. Dig. Fait, B. 4; Dole *v.* Thurlow, 12 Met. 157, 166; 3 Dane, Abr. 354; Craig *v.* Pinson, Cheves, 273; Meuley *v.* Zeigler, 23 Tex. 88; Thacher *v.* Phinney, 7 Allen, 149.

[5] Long *v.* Ramsay, 1 Serg. & R. 73; Ingram *v.* Hall, 1 Hayw. (N. C.) 205; Wiswall *v.* Ross, 4 Port. 321; Dole *v.* Thurlow, 12 Met. 157.

[6] For statutes, see note *post*, at the end of chapter c.

[7] Day *v.* Adams, 42 Vt. 510.

[8] Crane *v.* Reeder, 21 Mich. 24.

of an attestation or an acknowledgment of the deed by the grantor, before a proper officer, in order to its being used as evidence. In some States, witnesses are required to a deed only as a means of proving its execution in order to entitle it to record, and consequently the absence of witnesses does not invalidate the deed, and they are required only when the deed is not acknowledged by the grantor. When such is the case, most States require by statute — to which reference must be had by the reader — the attestation of two witnesses to entitle the deed to record.

§ 2134. **Sufficiency of the Attestation.**— In order to a sufficient attestation of a deed by a witness, it is not necessary that he should have seen the party write his name. It is enough if the latter asks the witness to subscribe to the attesting clause, and he does so in the signer's presence.[1] It is, however, necessary that the witness's name be subscribed on the deed. For instance, if the statute requires two witnesses to a deed, and there is only one name on the deed as witness, the fact that another person was present at the signing, but not for the purpose of witnessing the deed, is not enough to satisfy the requirements of the statute.[2] But witnesses to deeds cannot, like those to wills, express opinions of the capacity of the signers: they can only testify to facts as other witnesses do.[3]

§ 2135. **Of Execution by Attorney.** — A deed may be executed by the grantor himself; or, as a general rule, he may do it through his agent or attorney. By "executed" is meant signing, sealing, and delivering a deed.[4] But a power to execute a deed must itself be by an instrument under seal.[5] In respect to the mode in which this must be done in order to its creating a deed which is valid and binding upon the principal, much seeming nicety has been observed by the courts. Without citing any considerable number of the multiplied cases in which the question has arisen, it is sufficient to say, that the deed, in order to bind the principal, must appear to be

[1] Parke *v.* Mears, 2 Bos. & P. 217; Jackson d. Parker *v.* Phillips, 9 Cowen, 113.

[2] Kenyon *v.* Segar, 14 R. I. 490.

[3] Dean *v.* Fuller, 40 Penn. St. 474.

[4] Thorp *v.* Keokuk Coal Co., 48 N. Y. 255.

[5] Livingston *v.* Peru Iron Co., 9 Wend. 522.

clearly his. Whether it must be made in his name, or the signing must be expressed to be his act, done by his agent or attorney, is not without conflict in the decisions. Both the names of the principal and the attorney should properly appear in the execution of the deed, showing not only that the grant and seal were those of the principal, but by whom these acts were done. If the deed be the deed of the attorney, — and this is shown, among other things, by the fact that *he* grants, or *he* sets *his* seal, and the like,— it is void as to the principal;[1] but binds the attorney.[2] A deed by an attorney after the death of his principal is void, though the death be not known at the time of executing it.[3]

§ 2136. **Illustrations.** — A few cases will serve to show the nice distinctions and seeming conflict of opinion which have prevailed at different times upon this subject. In Wilks *v.* Back,[4] Grose, J., held, that executing a bond, "M. W. for J. B.," was as binding upon J. B. as if executed "J. B. by M. W." But this is altogether opposed to the doctrine advocated by Mr. Hoffman in the article above cited. And if it might avail as an execution of a bond, it is very much doubted whether it could if of a deed of conveyance; though, in Jones *v.* Carter,[5] Judge Roane held, that where a deed was signed B. W., "attorney for R. C.," it was clearly a good execution of the deed. But in Elwell *v.* Shaw, cited above, the deed recited the power of attorney; after which followed "J. S., by virtue of the power aforesaid, hereby grant, etc. In witness whereof, I have set the name and seal of,"— the principal. It was signed, "J. S." with a seal, and was held not to be the

[1] Fowler *v.* Shearer, 7 Mass. 14, 19; Clarke *v.* Courtney, 5 Pet. 319; White *v.* Cuyler, 6 T. R. 176; Frontin *v.* Small, Ld. Raym. 1418; Pryor *v.* Coulter, 1 Bail. 517; Harper *v.* Hampton, 1 Harr. & J. 709; 3 Am. Jur. 82 *et seq.*, — a learned and elaborate article by the late Mr. David Hoffman; Barger *v.* Miller, 4 Wash. C. C. 280; Elwell *v.* Shaw, 16 Mass. 42; Shanks *v.* Lancaster, 5 Gratt. 110; State *v.* Jennings, 10 Ark. 428; 1 Amer. Lead. Cas. 577 *et seq.*; McDonald *v.* Bear River, etc. Mining Co., 13 Cal. 235; Mussey *v.* Scott, 7 Cush. 215; Brinley *v.* Mann, 2 Cush. 337.

[2] Snow *v.* Orleans, 126 Mass. 453.

[3] Harper *v.* Little, 2 Me. 14; Stetson *v.* Patten, id. 358; Ferris *v.* Irving, 28 Cal. 648.

[4] Wilks *v.* Back, 2 East, 142.

[5] Jones *v.* Carter, 4 Hen. & M. 196.

deed of the principal. The case of Barger *v.* Miller, above cited, was substantially like that of Elwell *v.* Shaw in its facts and conclusions. In the case of Harper *v.* Hampton, the granting part of the deed was "R. G. H., for and as attorney of J. R., and in pursuance of the above mentioned power of attorney, hath granted, etc.;" and it was signed "R. G. H., attorney for J. R.;" and it was held to be the deed of the attorney, and not of the principal.[1] In the case of Wood *v.* Goodridge, the attorney executed the deed by signing the principal's name, but made no mention of its being done by the attorney; and it was held not to be an execution as to the principal.[2] But where the deed itself stated that it was executed by the grantor by his attorney W. M., and was simply signed M. H. (the principal's name), it was held a good execution.[3] In the case of Thurman *v.* Cameron,[4] however, the court held that the attorney must use the name of his principal, both in the body of the deed and by way of signature.

§ 2137. **Execution by Attorney, continued.**— It would probably be hopeless to attempt to reconcile the various cases which have arisen in the English and American courts upon the execution of deeds by attorney. The reader will find a large number of these collected and commented on by the editors of the American Leading Cases.[5] The leading doctrine running through them, though not always applied alike, seems to be, that, to make such a deed valid, the instrument itself must, in terms, show that it is the deed of the principal, that he makes the grants and the covenants, and that the seal is his. The instrument, in some part, must also show that its execution by the principal was done by the attorney named. If this all appears clearly in any part of the instrument, the precise form or arrangement of the words does not seem to be essential.[6]

[1] Elwell *v.* Shaw, 16 Mass. 42; Harper *v.* Hampton, 1 Harr. & J. 709; Barger *v.* Miller, 4 Wash. C. C. 280; Echols *v.* Cheney, 28 Cal. 160; Morrison *v.* Bowman, 29 Cal. 352; Townsend *v.* Corning, 23 Wend. 439.

[2] Wood *v.* Goodridge, 6 Cush. 117.

[3] Devinney *v.* Reynolds, 1 Watts & S. 328.

[4] Thurman *v.* Cameron, 24 Wend. 90.

[5] 1 Am. Lead. Cas. 577 *et seq.*

[6] See Doe d. Tenant *v.* Blacker, 27 Ga. 418; Butterfield *v.* Beall, 3 Ind. 203. And in McClure *v.* Herring, 70 Mo. 18, a deed which began, "I, A, for myself and as attorney for B and C, under a power, etc., in consideration of $—— paid

The rule in Maine, under the statute of the State, is that when a deed shows that the parties intended to bind the principal, and not the agent, it is the deed of the principal, though signed by the agent in his own name. To decide this, the whole deed must be inspected, — the granting part, the covenants, the attestation, sealing, and acknowledgment, as well as the manner of signing. Accordingly, where a deed purported to be the deed of the inhabitants of a town, and ended, "In witness whereof, they, by the hand of A, have set their seal, and A has signed his name," and A, as agent for the town, acknowledged it to be the free act and deed of the town, it was held to be the deed of the town.[1]

§ 2138. **Execution by Public Agents.** — An exception has practically grown up in New Hampshire, and been in use at times in Massachusetts, in the execution of deeds by towns and and other public bodies who act by attorney; it being there held to be sufficient that the deed is signed in behalf of the body represented by the attorney, but in the name and with the seal of the agent, though it seems rather to have been sustained on the ground that *communis error facit jus*.[2]

§ 2139. **Execution by Attorney — The Power.** — The character of the power under which a deed may be executed by an agent for another depends upon the circumstance, whether the act of signing is done in the presence or absence of the principal. If done in his presence, an oral direction to do the act will be sufficient, it being theoretically the act of the principal himself;[3] and the signature of the grantor may even be written

to us, do bargain and sell, etc., and we, said B and C, covenant, etc.," and ending, "In witness whereof, I, A, in my own right, have set my hand and seal, and as attorney for B and C have set their hands and seals," and signed A, and B and C, by A, their attorney in fact, was held a binding deed of B and C. For cases where equity grants relief when a deed has been sealed and delivered by mistake in the name of the attorney instead of the principal, see 1 Am. Lead. Cas. 585. See Wilkinson *v.* Getty, 13 Iowa, 157.

[1] Nobleboro *v.* Clark, 68 Me. 87.

[2] Cofran *v.* Cockran, 5 N. H. 458; Ward *v.* Bartholomew, 6 Pick. 409; Nobleboro *v.* Clark, 68 Me. 87; Magill *v.* Hinsdale, 6 Conn. 465. *Contra*, in Massachusetts. Brinley *v.* Mann, 2 Cush. 337.

[3] Ball *v.* Dunsterville, 4 T. R. 313; Gardner *v.* Gardner, 5 Cush. 483; Wood *v.* Goodridge, 6 Cush. 117, 121; King *v.* Longnor, 4 Barn. & Ad. 647; Shep. Touch. 57; Frost *v.* Deering, 21 Me. 156, where the husband signed the wife's name in her presence and by her direction, which was held sufficient. Burns *v.*

by the grantee, if in the grantor's presence, and the grantor afterwards takes the deed and acknowledges and delivers it as his own.[1] But if the act is to be done in the absence of the principal, it must be given by an instrument under the hand and seal of the principal;[2] nor would a subsequent acknowledgment, that the one acting as such was in fact the grantor's attorney, be sufficient. But where a wife, in the absence of her husband, signed his name to a deed, and he afterwards acknowledged the deed before a magistrate as his free act and deed, it ratified and made valid his signature.[3] A power under seal is the only way one can be made an attorney to execute a deed;[4] and, in many of the States, the instrument must be acknowledged and recorded like the deed itself.[5]

§ 2140. **Of reading the Deed to the Grantor.** — It may be necessary, in order to make a valid deed, if the party to its execution is unable to read it, and requires this to be done, to read it to him as it is written. But if the party can read, it is not open to him, after executing it, to insist that the terms of the deed were different from what he supposed them to be when he signed it. Nor could one who is unable to read be admitted to object that he was misled in signing a deed, unless he had requested to hear it read, and this had not been done, or a false reading had been made to him, or its contents falsely stated.[6]

Lynde, 6 Allen, 309, 310; Videau *v.* Griffin, 21 Cal. 392; Kime *v.* Brooks, 9 Ired. 219; Mackay *v.* Bloodgood, 9 Johns. 285.

[1] Clough *v.* Clough, 73 Me. 487.

[2] Shep. Touch. 57; Plummer *v.* Russel, 2 Bibb, 174; Montgomery *v.* Dorion, 6 N. H. 250; Walk. Am. Law, 365; Stetson *v.* Patten, 2 Me. 358. Nor will a subsequent parol adoption of the act make it valid. Smith *v.* Dickinson, 6 Humph. 261; Tappan *v.* Redfield, 1 Halst. Ch. 339; Rhode *v.* Louthain, 8 Blackf. 413; Kime *v.* Brooks, *supra*.

[3] Bartlett *v.* Drake, 100 Mass. 175.

[4] Videau *v.* Griffin, 21 Cal. 389; Hanford *v.* McNair, 9 Wend. 54.

[5] Montgomery *v.* Dorion, 6 N. H. 250. But the deed will be good against the grantor and his heirs, and create a good title against strangers, though the power is not registered. Walk. Am. Law, 365. Acknowledging and recording are not necessary in Georgia or Indiana. Doe d. Tenant *v.* Blacker, 27 Ga. 418; Moore *v.* Pendleton, 16 Ind. 481. But see Butterfield *v.* Beall, 3 Ind. 203.

[6] 1 Wood, Conv. 237; Shep. Touch. 56; Manser's case, 2 Rep. 3; Henry Pigot's case, 11 Rep. 27 *b*; Jackson d. Russell *v.* Croy, 12 Johns. 429; Hallenback *v.* Dewitt, 2 Johns. 404; Jackson d. Tracy *v.* Hayner, 12 Johns. 469; Taylor *v.* King, 6 Munf. 358; Com. Dig. Fait, B. 2; Souverbye *v.* Arden, 1 Johns. Ch. 252; Withington *v.* Warren, 10 Met. 434.

§ 2141. **What the Grantor is presumed to know.** — A grantor is presumed to have known the contents of the deed he has executed, unless the contrary be affirmatively shown.[1] And one who executes a deed cannot avoid it on the ground of ignorance of its legal effect.[2] The rule on this subject is thus stated: "A deed cannot be avoided in a court of law except for fraud in its execution, or other fraud or imposition practised upon the grantor in procuring his signature and seal," — a fraud which goes to the question, whether the deed ever had any legal existence. The law does not reach the cases of deeds procured by undue influence over the grantor, if he be of legal capacity. The only relief in such cases is in equity.[3]

§ 2142. **The Date.** — There is usually a date inserted in the deed, as indicating the time when the same was executed and delivered. And the law presumes that the deed was executed on that day.[4] And this is so, even if the date do not agree with the date of the acknowledgment, for that may have been made after the delivery of the deed.[5] In indentures, this is commonly at the beginning of the instrument; but in single deeds, or deeds-poll, it is generally inserted at the close. But though a presumption would arise that the deed was delivered and took effect on the day of its date, if there was nothing offered in evidence to control this, it is always competent to show that the date inserted was not the true date of its delivery. Besides, it is immaterial whether a deed has any date or not; nor would it be affected though the date was an impossible one, like the *thirtieth* of February. Dates have, however, been in general use since Edward II. and Edward III.[6]

[1] Kimball *v.* Eaton, 8 N. H. 391.

[2] 1 Wood, Conv. 238; 2 Rep. 3.

[3] Truman *v.* Lore, 14 Ohio St. 155; Hartshorn *v.* Day, 19 How. 223.

[4] Lyon *v.* McIlvaine, 24 Iowa, 15; Savery *v.* Browning, 18 Iowa, 249; Anderson *v.* Weston, 6 Bing. N. C. 296; Oshey *v.* Hicks, Cro. Jac. 264; Wheeler *v.* Single, 62 Wis. 380; Raines *v.* Walker, 77 Va. 92.

[5] People *v.* Snyder, 41 N. Y. 402; Darst *v.* Bates, 51 Ill. 439.

[6] Co. Lit. 6 *a*; Perkins, § 145; Goddard's case, 2 Rep. 4 *b*; Com. Dig. Fait, B. 3; Shep. Touch. 52, 55, 58; Jackson d. Hardenberg *v.* Schoonmaker, 2 Johns. 234; Colquhoun *v.* Atkinson, 6 Munf. 550; Lee *v.* Mass. F. & M. Ins. Co., 6 Mass. 208, 219; M'Kinney *v.* Rhoads, 5 Watts, 343; M'Connell *v.* Brown, Litt. Sel. Cas. 459; 1 Wood, Conv. 195; Geiss *v.* Odenheimer, 4 Yeates, 278; Osbourn *v.* Rider, Cro. Jac. 135; Thompson *v.* Thompson, 9 Ind. 333; Genter

§ 2143. **Delivery is essential.** — All courts and writers agree that the delivery of a deed is essential to its validity.[1] But, in applying the doctrine, they are not uniform in defining what constitutes such a delivery. A delivery of a deed is as essential to the passing of an estate as the signing; and so long as the grantor retains the legal control of the instrument, the title cannot pass any more than if he had not signed the deed.[2]

§ 2144. **What amounts to Delivery.** — It is no deed, and has no effect till delivered, even if antedated for the very purpose of giving it effect before the time of the actual delivery.[3] The paper need not be actually delivered to the grantee to have that effect, if the grantor, when executing it, intends it as a delivery, and this is known and understood by the grantee, and he and the grantor go on and act as if the estate had actually passed thereby.[4] And in one case, where a trustee, being indebted to the trust-estate, in order to secure it made a deed to himself as trustee regularly executed, except recording it, and died, leaving the deed among his papers, it was held to bind his land effectually as a declaration of a trust, and to have been sufficiently delivered for that purpose.[5]

§ 2145. **Deed stolen before Delivery.** — If a deed, duly executed in all respects but delivery, be stolen from the grantor, it passes no title even to a *bona fide* purchaser from the grantee named in the deed.[6] In the first place, the grantor must give up control or dominion over the deed; and, in the second place, the grantee must actually or by implication have accepted the deed as his own, and the estate conveyed by it.

v. Morrison, 31 Barb. 155; Banning *v.* Edes, 6 Minn. 402; Swan *v.* Hodges, 3 Head, 254.

[1] 1 Wood, Conv. 193; Shep. Touch. 57; Co. Lit. 35 *b*; Goddard's case, 2 Rep. 4 *b*; Com. Dig. Fait, A. 3; Hulick *v.* Scovil, 4 Gilm. 175; Church *v.* Gilman, 15 Wend. 656, 658; Fairbanks *v.* Metcalf, 8 Mass. 230, 239; Stiles *v.* Brown, 16 Vt. 563; Fletcher *v.* Mansur, 5 Ind. 267; Rittmaster *v.* Brisbane, 19 Col. 371; s. c. 35 Pac. Rep. 736.

[2] Cook *v.* Brown, 34 N. H. 476; Johnson *v.* Farley, 45 N. H. 510; Overman *v.* Kerr, 17 Iowa, 486, 490; Fisher *v.* Hall, 41 N. Y. 421; Younge *v.* Guilbeau, 3 Wall. 461.

[3] Xenos *v.* Wickham, 14 Com. B. N. S. 469; Mitchell *v.* Bartlett, 51 N. Y. 453.

[4] Walker *v.* Walker, 42 Ill. 311, case of a father and son; Rogers *v.* Carey, 47 Mo. 235.

[5] Carson *v.* Phelps, 40 Md. 73; 23 Am. L. Reg. o. s. 100, 102.

[6] Tisher *v.* Beckworth, 30 Wis. 55.

§ 2146. **Grantor's Death before Delivery.** — A delivery of a deed after the grantor's death is of no effect.[1]

§ 2147. **Grantee's Assent.** — The grantee must assent to the delivery; but where the deed is for his benefit, his assent will be presumed until the contrary appears. Thus, a deed was made to an unorganized corporation. After organization, the deed was recorded and it was held that acceptance would be presumed as the company was competent to receive the deed.[2] A, being indebted to B, agreed to secure him by a deed of his land. He made a deed unknown to B, and had it recorded, and B died without any knowledge of its being made; and it was held not to be a sufficient acceptance to make it good.[3] A deed voluntarily placed in the grantee's hands is never an escrow.[4] Where the grantor made a deed, which the grantee saw, and the grantor agreed to put it on record, and did so, but in the absence of the grantee, and without any formal delivery to him, it was held to be a good delivery, the register being by such assent constituted the agent to accept the delivery.[5] The deed must pass under the power of the grantee, or some one for his use, with the grantor's consent.[6] If, after a deed is put on record for the grantee, he assents to or ratifies the act, it becomes a good delivery. But any lien or attachment laid upon the land or the property of the grantor, before such assent, would hold.[7]

[1] Jackson d. Hopkins *v.* Leek, 12 Wend. 107; Fay *v.* Richardson, 7 Pick. 91; Fisher *v.* Hall, 41 N. Y. 423; Dinwiddie *v.* Smith, 141 Ind. 318; s. c. 40 N. E. Rep. 748; Wilson *v.* Wilson, 158 Ill. 567; s. c. 41 N. E. Rep. 1007. Where grantor made a deed of assignment of a mortgage, handed it to the grantee with directions to have it put on record, if he, the grantor, died before the grantee, and the deed was then deposited in a safe to which both parties had access, but grantee never used the assignment or mortgage, nor were the notes secured by the mortgage indorsed to the assignee, and were treated by the grantor as his own, it was held *not* to be a delivery. Shurtleff *v.* Francis, 118 Mass. 154.

[2] Rotch's Whf. Co. *v.* Judd, 108 Mass. 224.

[3] Jackson d. Eames *v.* Phipps, 12 Johns. 421; Woodbury *v.* Fisher, 20 Ind. 388.

[4] People *v.* Bostwick, 32 N. Y. 445, 454; Braman *v.* Bingham, 26 N. Y. 483.

[5] Cooper *v.* Jackson, 4 Wis. 549, 553; Parmelee *v.* Simpson, 5 Wall. 86.

[6] Somers *v.* Pumphrey, 24 Ind. 240; Dearmond *v.* Dearmond, 10 Ind. 191; Wilson *v.* Cassidy, 2 Ind. 562; Rivard *v.* Walker, 39 Ill. 413.

[7] Parmelee *v.* Simpson, 5 Wall. 81; Jackson *v.* Cleveland, 15 Mich. 101; Elmore *v.* Marks, 39 Vt. 538, 542.

Many of the cases hold, that a delivery of a deed to a stranger passes the title, upon the ground that the law presumes an assent and acceptance on the part of the grantee. But the same cases hold, that, if the grantee does dissent, the title does not pass.[1] Thus, where A sold land to B, but by mistake conveyed, in his deed to B, a parcel of land which A did not own: B's creditor levied on this land; but, finding the mistake, he procured a deed from the owner of the land to B, who refused to accept it: it was held to be of no effect in creating a title in B.[2] And some of the cases hold, that in such a case, until the deed is accepted, if it be not an escrow, the grantor may resume it, and thus prevent its taking effect at all.[3]

§ 2148. **Grantee's Assent — Manucaption not necessary.** — But a deed may be delivered without an actual manucaption by the grantee or his agent. Thus a wife, wishing to convey her land to her husband through a third person, joined with him in making a deed, which was left upon their table till the next morning, when the grantee came and executed a deed to the husband, who took both deeds and put them on record, and it was held to be a good delivery.[4]

§ 2149. **Retention by Grantor after Delivery.** — And, if once delivered, the validity and effect of the act will not be impaired by the deed being taken and retained by the grantor.[5] Thus, when a man, before marriage, delivered a deed of a house and land to his intended wife, saying there was the deed of the house he had promised her, and she took it, and after some conversation returned it to him to have it recorded and to take care of for her, it was held to be a good delivery.[6]

§ 2150. **Effect of Delivery.** — And if once delivered, it can-

[1] Peavey *v.* Tilton, 18 N. H. 152; Tompkins *v.* Wheeler, 16 Pet. 119; Thompson *v.* Leach, 2 Vent. 198; Welch *v.* Sackett, 12 Wis. 243; Read *v.* Robinson, 6 Watts & S. 329; Xenos *v.* Wickham, 14 Com. B. N. S. 474, and notes to Am. ed.

[2] Rogers *v.* Carey, 47 Mo. 232.

[3] Johnson *v.* Farley, 45 N. H. 509; Derry Bank *v.* Webster, 44 N. H. 268.

[4] Somers *v.* Pumphrey, 24 Ind. 240; Folly *v.* Vantuyl, 9 N. J. L. 153. See also Shelton's case, Cro. Eliz. 7; Penn. Ins., etc. Co. *v.* Dovy, 64 Penn. St. 260.

[5] Souverbye *v.* Arden, 1 Johns. Ch. 255; Shelton's case, Cro. Eliz. 7; Connelly *v.* Doe d. Skelly, 8 Blackf. 320; Somers *v.* Pumphrey, 24 Ind. 240.

[6] Otis *v.* Spencer, 102 Ill. 622.

not, if valid, be defeated by any subsequent act, unless it be by virtue of some condition contained in the deed itself.[1]

§ 2151. **Can be but one Delivery.** — Regularly, therefore, there can be but one delivery of the same deed; for, if the first is effectual, the second cannot be of any avail. This principle is applicable in cases where infants, *femes covert*, and the like, have undertaken to give validity to a deed which has once been delivered, by delivering it a second time. And the result is, that where it is merely voidable, as in the case of an infant, or person of non-sane memory, a second delivery after his disability has been removed would be simply void; whereas, a delivery by a *feme covert* being void, if she makes a second one on becoming *discovert*, it will be good, and give effect to her deed.[2] Where husband and wife joined in a deed of the wife's land, but the deed was not delivered until after her death, though the deed thereby passed the interest of the husband, it did not that of the wife, since the deed never took effect in her lifetime.[3]

§ 2152. **A Deed takes Effect from its Delivery**, irrespective of its date, though *prima facie* the date is to be taken at the time of delivery.[4] But if the date of the acknowledgment is subsequent to the date of the deed, the law does not presume a delivery prior to the acknowledgment.[5]

§ 2153. **Delivery of Incomplete Deed ineffectual.** — But, to have the effect of a delivery, the deed must first have been executed completely: no delivery before that can give force to the deed.[6]

[1] Hawksland *v.* Gatchel, Cro. Eliz. 835; Com. Dig. Fait, A. 36. See 1 Wood, Conv. 194; Younge *v.* Moore, 1 Strobh. 48.

[2] 1 Wood, Conv. 196; Com. Dig. Fait, B. 5; Shep. Touch. Prest. ed. 60, and note; 2 Rolle, Abr. Fait, N. 1; Verplank *v.* Sterry, 12 Johns. 536, 548; Mills *v.* Gore, 20 Pick. 28, 36; Perkins, § 154.

[3] Shoenberger *v.* Zook, 34 Penn. St. 24.

[4] Harrison *v.* Phillips Academy, 12 Mass. 456, 460; Jackson d. Griswold *v.* Bard, 4 Johns. 230; Geiss *v.* Odenheimer, 4 Yeates, 278; 1 Wood, Conv. 195; Goddard's case, 2 Rep. 4 *b*; Shep. Touch. 58, 72; Colquhoun *v.* Atkinson, 6 Munf. 550; M'Connell *v.* Brown, Lit. Sel. Cas. 462; Raines *v.* Walker, 77 Va. 92; Com. Dig. Fait, G.; Cutts *v.* York Mg. Co., 18 Me. 190; Wheeler *v.* Single, 62 Wis. 380. But see Elsey *v.* Metcalf, 1 Denio, 323; Smith *v.* Porter, 10 Gray, 67.

[5] Blanchard *v.* Tyler, 12 Mich. 339.

[6] 1 Wood, Conv. 194; Shep. Touch. 58; M'Kee *v.* Hicks, 2 Dev. 379; Burns *v.* Lynde, 6 Allen, 305.

§ 2154. **Delivery actual or verbal, or both.** — In undertaking to define what will constitute a delivery of a deed, it is said that it may either be "actual, that is, by doing something, and saying nothing; or verbal, that is, by saying something, and doing nothing; or it may be by both.". But it must be by something answering to the one or the other, or both these, and with an intent thereby to give effect to the deed.[1] Among the illustrations given of what would amount to a delivery by the mode above stated is that of a deed lying upon a table in presence of the parties, and the grantor tells the grantee to take it, and he does so. Here the delivery takes place by words alone on the part of the maker. If, on the other hand, the grantor throws the deed upon the table, intending the other party to take it, and he does so, it will be a delivery, though nothing is said. If, however, the deed is laid upon the table without any such intention, and the grantee takes it up, it will not amount to a delivery.[2] If, therefore, one to whom a deed is made gets possession of it, without something answering to a delivery on the part of the maker, it will not avail him, nor affect the title of the maker.[3] Thus where the grantee, after the formal execution of the deed by the grantor, took the same in the grantor's presence, without any objection on his part, it was held to be a good delivery.[4] So, though the grantor deliver the deed in consequence of false and fraudulent pretenses, if it be delivered, and grantee conveys to an innocent third party, it passes a good title.[5] If delivered, the deed takes effect, though both

[1] Com. Dig. Fait, A. 3, A. 4; Shep. Touch. Prest. ed. 58 n.; 1 Wood, Conv. 193; Co. Lit. Day's ed. 36 *a*, and note 223; 2 Rolle, Abr. Fait, K.; Verplank *v.* Sterry, 12 Johns. 536; Mills *v.* Gore, 20 Pick. 28, 36; Hughes *v.* Easten, 4 J. J. Marsh. 572; Meth. Ep. Ch. *v.* Jaques, 1 Johns. Ch. 450; Dearmond *v.* Dearmond, 10 Ind. 191; Berry *v.* Anderson, 22 Ind. 39.

[2] Com. Dig. Fait, A. 3; Mills *v.* Gore, 20 Pick. 28, 36; Chamberlain *v.* Staunton, 1 Leon. 140; 1 Wood, Conv. 193, 195; Meth. Ep. Ch. *v.* Jaques, 1 Johns. Ch. 456; Shep. Touch. 58; Thoroughgood's case, 9 Rep. 136; Co. Lit. 36 *a*, 49 *b*.

[3] 1 Wood, Conv. 193; Cutts *v.* York Mg. Co., 18 Me. 190; Black *v.* Lamb, 12 N. J. Eq. 108, 116; Roberts *v.* Jackson d. Webb, 1 Wend. 478; Hadlock *v.* Hadlock, 22 Ill. 388; Tisher *v.* Beckwith, 30 Wis. 55; Ford *v.* James, 2 Abb. Dec. 162.

[4] Williams *v.* Sullivan, 10 Rich. Eq. 217; Stewart *v.* Weed, 11 Ind. 94.

[5] Berry *v.* Anderson, 22 Ind. 41.

parties, under a mistake of law, understood it would not be effectual as a delivery until put on record.[1]

§ 2155. **Delivery by Corporation.** — Ordinarily, nothing further is required to constitute a delivery of a deed, on the part of a corporation, than that their common seal should be put to it by the consent of the corporation, unless, when executing it, they appoint an attorney to deliver it. In that case, it does not become their deed until its formal delivery.[2] A delivery of a deed to the authorized agent of a corporation is a delivery to the corporation.[3]

§ 2156. **Of Delivery through a Third Party.** — A deed may be delivered to the grantee himself, or it may be delivered to a stranger unknown to the person for whose benefit it is made, if so intended by the maker; and this may be an effectual delivery the moment it is assented to by the grantee, even though the grantor may in the mean time have deceased.[4] Thus, in Hatch *v.* Hatch, and Foster *v.* Mansfield,[5] a father made a deed to his son, and placed it in a stranger's hands to be delivered to the grantee on the grantor's death. It remained there until the death of the latter, and was then delivered to the grantee, and was held to be a good deed, although the original delivery was not regarded as that of an escrow by the grantor. But, in another case, A made a deed to B, and delivered it to C, to hold subject to A's order during his life, and, in case of his death, to deliver it to B. After A's death, C delivered it to B; but it was held to be no delivery, and that nothing passed by the deed.[6] In Pennsylvania, the doctrine of Hatch *v.* Hatch is

[1] Henchliff *v.* Hinman, 18 Wis. 138.

[2] 1 Wood, Conv. 194; Co. Lit. 36 n., 22 n.; Willis *v.* Jermine, 2 Leon. 97; s. c. Cro. Eliz. 167; Com. Dig. Fait, A. 3; 2 Rolle, Abr. Fait, 1.

[3] Western R. R. Corp. *v.* Babcock, 6 Met. 356.

[4] 1 Wood, Conv. 193; Com. Dig. Fait, A. 3; Hatch *v.* Hatch, 9 Mass. 307; Hulick *v.* Scovil, 9 Gilm. 176; Buffum *v.* Green, 5 N. H. 71; Belden *v.* Carter, 4 Day, 66; Ruggles *v.* Lawson, 13 Johns. 285; Wheelwright *v.* Wheelwright, 2 Mass. 447, 452; Doe d. Garnons *v.* Knight, 5 Barn. & C. 671; O'Kelly *v.* O'Kelly, 8 Met. 436; Foster *v.* Mansfield, 3 Met. 412; Wesson *v.* Stephens, 2 Ired. Eq. 557; Morrison *v.* Kelly, 22 Ill. 626; Marsh *v.* Austin, 1 Allen, 238; Cooper *v.* Jackson, 4 Wis. 553; Hatch *v.* Bates, 54 Me. 139; Kingsbury *v.* Burnside, 58 Ill. 310; Cecil *v.* Beaver, 28 Iowa, 241.

[5] Hatch *v.* Hatch, 9 Mass. 307; Foster *v.* Mansfield, 3 Met. 412; O'Kelly *v.* O'Kelly, 8 Met. 439; Stephens *v.* Rinehart, 72 Penn. 440.

[6] Prutsman *v.* Baker, 30 Wis. 644; Benneson *v.* Aiken, 102 Ill. 284.

fully sustained.[1] When, however, a soldier, upon going into the service, made a deed to his wife, and left it, with other papers with her, without her knowing what they were, and he died without returning, after which she discovered the deed, it was held to be a sufficient delivery.[2] But so long as the deed is within the control of the grantor, and subject to his authority, it cannot be held to have been delivered. Thus, where the grantor placed a deed in another's hands, and directed him to keep it till he, the grantor, died, and to hold it subject to his control as long as he lived, and then to deliver it to the grantee, it was held to be no delivery. A deed cannot be even an *escrow*, unless the grantor part with the control of it until the condition on which it depends happens or fails. Nor will the court presume an acceptance of a deed, so long as the grantee is ignorant of its having been made.[3]

§ 2157. **Illustrations.** — The case of Belden *v.* Carter involved the same principle; and the case of Doe d. Garnons *v.* Knight furnishes, perhaps, a still stronger illustration of this doctrine.[4] There, one Wynne, being indebted to Garnons, made and executed a mortgage to him in his absence, and without his knowledge, in the presence of his niece, who witnessed it, and to whom he declared that he delivered it. He afterwards had the deed in his possession, wrapped in an envelope, and handed the envelope to his sister, telling her to keep it, and that it belonged to Garnons. After that he took it again, and, at a subsequent time, handed it again to her, saying, "Put this by." The matter stood thus until Wynne died, when the sister handed the parcel to a friend of Garnons, through whom he received it. Wynne, in his lifetime, had assured Garnons that he would secure him from his indebtedness. The judge who tried the case instructed the jury, that, if Wynne retained the control of the deed, there was no delivery; but that if he parted

[1] Stephens *v.* Huss, 54 Penn. St. 26.

[2] Dale *v.* Lincoln, 62 Ill. 22.

[3] Prutsman *v.* Baker, 30 Wis. 644, wherein the court disapprove of Doe d. Garnons *v.* Knight, *infra*, because the deed remained subject to the grantor's control.

[4] Belden *v.* Carter, 4 Day, 66; Doe d. Garnons *v.* Knight, 5 Barn. & C. 671. See Doe d. Garnons *v.* Knight, explained and applied in Xenos *v.* Wickham, 15 Com. B. N. S. 470.

with it, and for the benefit of Garnons, in order that it should be delivered to him in Wynne's lifetime, or after his death, it would be a good delivery: which ruling the Court of King's Bench held to be correct, and the verdict in favor of the validity of the deed was sustained.

§ 2158. **Grantor must part with Control of Deed.** — Garnons *v.* Knight forms one of a pretty large class of cases wherein the principle is maintained, that, so far as the grantor is concerned, it will be a sufficient act of delivery, if, after executing a deed, he place it in the hands of another, out of his own possession and control, if done with an intent that it should take effect as his deed, in favor of the grantee; and the same will become effectual to pass the estate granted, as soon as the same is known and assented to by the grantee.[1] It would be otherwise if the grantor retain control over the deed as to its delivery, as when he delivers it to a third party to keep and deliver it to the grantee named, *unless* he should call for it again.[2] But where a father made a deed to his minor children, and, when he acknowledged it, he told the magistrate to keep it, and have it recorded, which he did, it was held to be a good delivery, although the father, after it had been recorded, notified the recording officer not to deliver it to any one but himself, except, in case of his death, it was to be delivered to the grantees.[3] There is a conflict of authorities on the question whether courts will presume the acceptance by the grantor of a deed which has been made without his knowledge and is deposited with a third party for the use of the grantee. If, however, it is merely delivered to a third person to keep, without the knowledge of the grantee, though he be the son of the grantor, it would have no effect if the grantor could withdraw it at his pleasure, even if it remained in that state till the grantor's death.[4]

[1] Cin., Wil. & Z. R. R. Co. *v.* Iliff, 13 Ohio St. 249; Oliver *v.* Stone, 24 Ga. 63, 70; Mallett *v.* Page, 8 Ind. 364; Guard *v.* Bradley, 7 Ind. 600; Stewart *v.* Weed, 11 Ind. 92; Butler & Baker's case, 3 Rep. 26 *b*; Broom, Com. 275; Phillips *v.* Houston, 5 Jones (N. C.), 302; Cloud *v.* Calhoun, 10 Rich. Eq. 358, 362; Boody *v.* Davis, 20 N. H. 140; Mitchell *v.* Ryan, 3 Ohio St. 382; Church *v.* Gilman, 15 Wend. 656.

[2] Phillips *v.* Houston, *supra*, and cases cited; Deardorff *v.* Foresman, 24 Ind. 481; 14 Am. L. Reg. o. s. 545; Cook *v.* Brown, 34 N. H. 476; Lang *v.* Smith, 37 W. Va. 725; s. c. 17 S. E. Rep. 213.

[3] Rivard *v.* Walker, 39 Ill. 413.

[4] Baker *v.* Haskell, 47 N. H. 479.

The law on this subject is thus stated by Shaw, C. J.: "It is true, that, in theory of law, the grantee in a deed-poll is held to be a party by accepting the deed. But the deed does not derive its efficacy as a grant and conveyance from the act of the grantee in accepting, but from that of the grantor in executing it. In case of a plain, absolute conveyance without condition, either no special acceptance is necessary to give it effect, or, what is nearly the same thing, the acceptance of the grantee will be presumed. So the delivery of the deed to a third person, unconditionally, for the use of the grantee, gives effect to the deed.

§ 2159. **Delivery may be made to Person under Disability.** — "From these considerations, it seems to follow that the efficacy of a deed to transfer real estate by deed-poll does not depend upon the legal capacity of the grantee to transfer an estate by deed." It was accordingly held, that a conveyance may be made by deed-poll to an infant, lunatic, or *feme covert*, although such grantee would be under legal disability to make a conveyance.[1] Where the grantees are minors, and the grant is a beneficial one, the law will presume an acceptance by them.[2] In Iowa, if the grant is beneficial to the grantee, and the deed be executed and recorded, a delivery and acceptance of it will be presumed, unless the contrary is shown.[3]

§ 2160. **Grantees under Disability — Presumption of Acceptance.** — The foregoing remarks, however, it would seem, are to be taken as a statement of what, in certain cases, would be taken as *evidence* of assent on the part of the grantee, rather than as doing away with what seems to be a first principle, that no man can be compelled to become a purchaser of land without his knowledge and assent. Thus it is said, "The act of making, acknowledging, and having the deed recorded, would not be sufficient to transfer the title, for the reason that a contract can only be consummated by the act of two persons, or, in technical language, by the assent of two minds, one agreeing to part with, the other to

[1] Concord Bk. *v.* Bellis, 10 Cush. 278; Mitchell *v.* Ryan, 3 Ohio St. 387; Peavey *v.* Tilton, 18 N. H. 152; Campbell *v.* Kuhn, 45 Mich. 513.

[2] Spencer *v.* Carr, 45 N. Y. 410; Rivard *v.* Walker, 39 Ill. 413; Cecil *v.* Beaver, 28 Iowa, 241.

[3] Robinson *v.* Gould, 26 Iowa, 93; Cecil *v.* Beaver, *supra.*

accept, the title." "It is no answer to this position to say, that, when a deed has been properly acknowledged and recorded, a delivery will be presumed; for this presumption, like all presumptions which exist only for the sake of convenience, must yield to facts when established."[1] And when a third party, whose rights are not affected by the deed, relies upon the deed, or one whose rights attached to the property before the making of the deed, disputes it, the whole question may be gone into on the evidence.[2]

§ 2161. **Delivery through Third Party — Assent of Grantee.** — But although several of the cases seem to sustain the doctrine, that a delivery of a deed to a stranger for the grantee, where it is obviously for his benefit, passes the title at once as an effectual delivery, the better opinion seems to be, that no deed can take effect as having been delivered until such act of delivery has been assented to by the grantee, and he shall have done something equivalent to an actual acceptance of it; and, moreover, the act of delivery and acceptance must, from the nature of the case, be mutual and concurrent acts. "Delivery always implies an acceptance by the person to whom the delivery is made," and a presumption of delivery arising from the deed being recorded may be rebutted by proof. "Acceptance by grantee is an essential part of a delivery."[3]

§ 2162. **Assent must be in Grantor's Lifetime.** — Proof of an acceptance, at a time subsequent to that of the act of delivery, would not be sufficient to give validity to the deed, unless the act of delivery be a continuing one in its nature, such as leaving a deed on deposit to be accepted by the grantee at his election.[4] Thus, where a father made a deed to his son, and caused

[1] Bullitt *v.* Taylor, 34 Miss. 741. See Boardman *v.* Dean, 34 Penn. St. 252; Berks. M. F. I. Co. *v.* Sturgis, 13 Gray, 177. See Mitchell *v.* Ryan, 3 Ohio St. 386, 387; Jackson d. Pintard *v.* Bodle, 20 Johns. 184; Dikes *v.* Miller, 24 Tex. 417; Derry Bk. *v.* Webster, 44 N. H. 268; Somers *v.* Pumphrey, 24 Ind. 243; Mallett *v.* Page, 8 Ind. 364.

[2] Jefferson Co. Building Assoc. *v.* Heil, 81 Ky. 513.

[3] Wilsey *v.* Dennis, 44 Barb. 359; Fonda *v.* Sage, 46 Barb. 123; Foster *v.* Beardsley Scythe Co., 47 Barb. 513; Younge *v.* Guilbeau, 3 Wall. 636, 641; Xenos *v.* Wickham, 14 Com. B. N. S. 474, note; Jackson d. Eames *v.* Phipps, 12 Johns. 422.

[4] Hulick *v.* Scovil, 9 Ill. 177, a very fully considered and ably reasoned opinion; Buffum *v.* Green, 5 N. H. 71; Canning *v.* Pinkham, 1 N. H. 353; Church *v.*

the same to be recorded in the registry of deeds, where it lay at the time of the death of his son, who never knew of or assented to such deed, it was held, that it never took effect to pass any title to his son, nor could his heirs claim under it.[1]

§ 2163. **Mere Transfer of Possession not Delivery.** — It is an essential prerequisite, that the instrument in question should be understood by the parties to be completed and ready for delivery, in order to have a mere placing it in the hands or possession of the grantee or his agent construed into a delivery. Thus, in one case, it was handed by one party to the other to examine and see if it was satisfactory, it being understood that it might be necessary to alter or correct it. In another, it was handed to the attorney of the other party, accompanied by a declaration by the party executing it, that he was not to be bound until something else was done. And, in both these cases, it was held not to be a delivery.[2] So, where one executed a deed, and left it with the grantee's agent to keep till the grantee concluded whether to accept of it or not, it was held to be no delivery. And even if the deed is deposited with the grantee, but for a purpose other than delivery, it would not take effect as a deed; nor can a title be derived from a deed which has not been delivered.[3] While, therefore, it is not competent to control a deed by parol evidence, where it has once taken effect by delivery, it is always competent, by such evidence, to show that the deed, though in

Gilman, 15 Wend. 656, 660; Jackson d. M'Crea *v.* Dunlap, 1 Johns. Cas. 114; Lloyd *v.* Giddings, 7 Ohio, pt. 2, 50; Jackson d. Pintard *v.* Bodle, 20 Johns. 187; 1 Wood, Conv. 240.

[1] Maynard *v.* Maynard, 10 Mass. 456. See also Jackson d. Eames *v.* Phipps, 12 Johns. 418; Pennel *v.* Weyant, 2 Harring. 501; Elsey *v.* Metcalf, 1 Denio, 326; Jones *v.* Bush, 4 Harring. 1. But see Mitchell *v.* Ryan, 3 Ohio St. 377; Hatch *v.* Bates, 54 Me. 140; Kingsbury *v.* Burnside, 58 Ill. 310; Baker *v.* Haskell, 47 N. H. 479; Wall *v.* Wall, 30 Miss. 91; Tibbals *v.* Jacobs, 31 Conn. 428; Cecil *v.* Beaver, 28 Iowa, 241.

[2] Graves *v.* Dudley, 20 N. Y. 76; Millership *v.* Brookes, 5 Hurlst. & N. 797, Am. ed. and n. and cases cited; Black *v.* Shreve, 13 N. J. Eq. 457. See Parker *v.* Parker, 1 Gray, 409; Howe *v.* Dewing, 2 Gray, 476; Worrall *v.* Munn, 5 N. Y. 229; Phil., W. & B. R. R. Co. *v.* Howard, 13 How. 334; Bell *v.* Ingestre, 12 Q. B. 317; Dyson *v.* Bradshaw, 23 Cal. 528; Berry *v.* Anderson, 22 Ind. 39; Fonda *v.* Sage, 46 Barb. 124.

[3] Ford *v.* James, 2 Abb. Dec. 162.

the grantee's hands, has never been delivered.[1] And the intention of the grantor, whether his act should be a delivery of the deed or not, is a question of fact for the jury.[2]

§ 2164. **Delivery — Presumption from recording.** — Nor will the making and executing a deed in all respects, even to registering the same, be of any validity, unless delivered in the lifetime of the grantor; though if the recording of the deed is intended as a delivery, and is known to the grantee, and he assents to the same, it will take effect from the time he so assents.[3] There are, however, cases which hold that when a deed which is wholly beneficial to the grantee is placed on record by the grantor, even without the knowledge of the grantee, this is a good delivery, the assent of the grantee being presumed, in absence of evidence to the contrary.[4] And if recorded with the assent of the grantee, it is valid, though it never came to her possession, but was taken from the registry by the grantor, and kept by him.[5] Making a deed and putting it on record without the knowledge of the grantee would be no delivery; and if the grantor then take the deed, and do not actually deliver it, no knowledge or assent of the grantee in respect to the deed will give it effect, if the grantor, prior to such assent, had concluded not to deliver it, and continued of that mind afterwards.[6] Delivery is not presumed

[1] Black *v.* Lamb, 12 N. J. Eq. 116; Roberts *v.* Jackson d. Webb, 1 Wend. 478; Johnson *v.* Baker, 4 B. & Ald. 440; Black *v.* Shreve, 13 N. J. Eq. 457, 459.

[2] Gregory *v.* Walker, 38 Ala. 26; Baker *v.* Haskell, 47 N. H. 479; Dwinell *v.* Bliss, 58 Vt. 353; s. c. 5 Atl. Rep. 317.

[3] Jackson d. Hopkins *v.* Leek, 12 Wend. 107; Barns *v.* Hatch, 3 N. H. 304; Denton *v.* Perry, 5 Vt. 382; Harrison *v.* Phillips Acad., 12 Mass. 455, 461; Jackson d. Eames *v.* Phipps, 12 Johns. 418; Jackson d. Ten Eyck *v.* Richards, 6 Cow. 617; Elsey *v.* Metcalf, 1 Denio, 326; Hedge *v.* Drew, 12 Pick. 141; Powers *v.* Russell, 13 Pick. 69, 77; Parker *v.* Hill, 8 Met. 447, that a delivery, after being recorded, is good; Porter *v.* Buckingham, 2 Harring. 197; Baldwin *v.* Maultsby, 5 Ired. 505; Swiney *v.* Swiney, 14 Lea, 316; Stilwell *v.* Hubbard, 20 Wend. 44; Rathbun *v.* Rathbun, 6 Barb. 98; Oliver *v.* Stone, 24 Ga. 63; Berks. M. F. I. Co. *v.* Sturgis, 13 Gray, 177; Boardman *v.* Dean, 34 Penn. St. 252; Boody *v.* Davis, 20 N. H. 140; Shaw *v.* Hayward, 7 Cush. 174; Mills *v.* Gore, 20 Pick. 28; *ante*, § 2144; Younge *v.* Guilbeau, 3 Wall. 641.

[4] Burke *v.* Adams, 80 Mo. 504; Davis *v.* Pacific Imp. Co., 118 Cal. 45; s. c. 50 Pac. Rep. 7.

[5] Amidon *v.* Benjamin, 128 Mass. 534.

[6] Hawkes *v.* Pike, 105 Mass. 560; Hatch *v.* Bates, 54 Me. 139. But see Robinson *v.* Gould, 26 Iowa, 93; Cecil *v.* Beaver, 28 Iowa, 241; Alexander *v.*

from the fact that the grantor has acknowledged the deed;[1] nor is delivery conclusively presumed from the fact of record. It is only an inference of fact, liable to be rebutted by showing that the grantor did not intend a delivery.[2] It is, however, sufficient to put the burden on the other side of proving that there was no delivery.[3] And the question of delivery or not is for the jury.[4]

§ 2165. **Other Presumptions of Delivery.** — If a deed is found in the grantee's hands, a delivery and acceptance is always presumed.[5] And the execution of a deed in the presence of an attesting witness is evidence from which a delivery may be inferred.[6]

§ 2166. **Grantee estopped by Acceptance.** — If a grantee, in a deed which has been recorded, accept it after the grantor's death, it would estop him to deny its effect.[7]

§ 2167. **Must be shown that Grantee was in esse.** — And although, where the grantor has parted with all control of the deed, and it is upon its face beneficial to the grantee, an acceptance thereof may be presumed, notwithstanding the delivery was made to one without any previous authority to receive it, still it would be necessary, in order for this presumption to be entertained, that the person claiming under such a deed should show affirmatively, if the fact is doubtful, that the grantee was *in esse* at the time of such delivery made.[8]

Alexander, 71 Ala. 295; Barnes *v.* Barnes, 161 Mass. 381; s. c. 37 N. E. Rep. 379; O'Connor *v.* O'Connor, 100 Iowa, 476; s. c. 69 N. W. Rep. 676.

[1] Alexander *v.* De Kermel, 81 Ky. 345; Boyd *v.* Slayback, 63 Cal. 493.

[2] Hendricks *v.* Rasson, 53 Mich. 575; Alexander *v.* Alexander, 71 Ala. 295; Walton *v.* Burton, 107 Ill. 54; Union Mut. Ins. Co. *v.* Campbell, 95 Ill. 267; Fair Haven M. & M. S. Co. *v.* Owens, 69 Vt. 246; s. c. 37 Atl. Rep. 749.

[3] Walton *v.* Burton, *supra*.

[4] Hendricks *v.* Rasson, *supra*.

[5] Clarke *v.* Ray, 1 Harr. & J. 319; Ward *v.* Lewis, 4 Pick. 518; Ward *v.* Ross, 1 Stew. (Ala.) 136; Canning *v.* Pinkham, 1 N. H. 353; Cutts *v.* York Mg. Co., 18 Me. 190; Green *v.* Yarnall, 6 Mo. 326; Houston *v.* Stanton, 11 Ala. 412; Chandler *v.* Temple, 4 Cush. 285; Southern L. Ins., etc. Co. *v.* Cole, 4 Fla. 359; Wallace *v.* Berdell, 97 N. Y. 13. But it is competent to show that it was surreptitiously obtained. Den d. Farlee *v.* Farlee, 21 N. J. 279; Morris *v.* Henderson, 37 Miss. 501; Adams *v.* Frye, 3 Met. 109; Williams *v.* Sullivan, 10 Rich. Eq. 217; Little *v.* Gibson, 39 N. H. 505; Black *v.* Shreve, 13 N. J. Eq. 459; Wolverton *v.* Collins, 34 Iowa, 238.

[6] Howe *v.* Howe, 99 Mass. 98; Moore *v.* Hazleton, 9 Allen, 106.

[7] Ford *v.* Flint, 40 Vt. 382.

[8] Hulick *v.* Scovil, 9 Ill. 190; Bensley *v.* Atwill, 12 Cal. 231, 236.

§ 2168. **Delivery — Particular Cases.** — Where the grantor, after executing the deed ready for delivery, retained it, by an agreement with the grantee, as security for the payment of the purchase-money, it was held to be neither a delivery nor an acceptance.[1] But where the parties were together, and a deed was duly executed and acknowledged, a declaration by the grantor that he delivered it as his deed, without asserting any right to retain it, was held to be a delivery, although the deed was left where it was executed, and was afterwards found in the grantor's possession.[2] So where a father made a deed to a son, and handed it to his wife, and soon after met his son and told him what he had done, and that the deed was at his house ready for him. The son afterwards occupied the premises, and erected a house thereon. After the death of the father, it was held that the fact of delivery of the deed could not be controverted.[3] But where one, in the execution of an agreement to convey lands, tenders a deed fully executed and acknowledged in performance of that agreement, which the grantee refuses to accept, it in no manner affects the vendor's title to his estate.[4]

§ 2169. **Person to whom Delivery made affords Presumption.** — Where the deed is delivered to the grantee named, the law presumes it was done with an intent, on the part of the grantor, to make it his effectual deed; but if it is delivered to a stranger, and nothing is said at the time, no such inference is drawn from the act of delivery.[5] But it has been held, that depositing a deed in the post-office, under a direction to the grantee, is tantamount to sending it by a special messenger, and is a delivery.[6] In like manner, the relation of a party to whom the deed is delivered to the estate and the grantee named may be such, that the law will imply an acceptance sufficient to give effect to the deed. Thus in one case, where delivery was made to a

[1] Jackson d. M'Crea *v.* Dunlap, 1 Johns. Cas. 114.

[2] Scrugham *v.* Wood, 15 Wend. 545; Souverbye *v.* Arden, 1 Johns. Ch. 253, 255; Wallace *v.* Berdell, 97 N. Y. 13; Stewart *v.* Weed, 11 Ind. 92; Penn. Ins., etc. Co. *v.* Dovey, 64 Penn. St. 260.

[3] Walker *v.* Walker, 42 Ill. 311, 314.

[4] Cole *v.* Gill, 14 Iowa, 529.

[5] Shep. Touch. Prest. ed. 58; Church *v.* Gilman, 15 Wend. 656; 1 Wood, Conv. 195. For what should be said, see Souverbye *v.* Arden, 1 Johns. Ch. 255.

[6] M'Kinney *v.* Rhoads, 5 Watts, 343.

father for his daughter, his acceptance was held sufficient from his character as her natural guardian.[1] So where a deed of trust was delivered to the *cestui que trust*, who was the beneficiary under the provisions of the deed.[2] If a deed is delivered to and accepted by the trustee, the delivery is valid.[3]

§ 2170. **Several Grantees — Delivery.** — If there are several grantees in a deed, it may be delivered to one on one day, and to another on another day, and thereby take effect as to all.[4] But a delivery to one does not operate as a delivery to the other, unless so expressed by the grantor.[5] And where an indenture of partition, prepared to be signed by several cotenants, was executed by one, and came into the possession of the others, who refused to execute, it was held not to be a delivery on his part.[6]

§ 2171. **Husband's Dissent from Deed to Wife.** — It has been stated, that, to give effect to a deed, there must be an assent to it by the grantee; and where it is in his favor, the law inclines to presume such assent; yet if a deed be made to a married woman, and her husband dissents thereto, it is void as to her at common law.[7] If the grant be to husband and wife, and he assent, she cannot, after his death, avoid the deed by verbal waiver or disclaimer of the title.[8] But it is unqualifiedly stated by Coke, that if an estate be conveyed to a wife, and the husband expressly assents to the same, she may, after his death, and so may her heirs, waive the same.[9]

§ 2172. **Delivery to Grantee's Agent.** — If a deed is delivered to one who is authorized by another to receive it for him, or to one without such previous authority, but authorized by the

[1] Bryan *v.* Wash, 2 Gilm. 557.

[2] Souverbye *v.* Arden, 1 Johns. Ch. 240; Jaques *v.* Meth. Ep. Ch., 17 Johns. 577; s. c. 1 Johns. Ch. 456; Cloud *v.* Calhoun, 10 Rich. Eq. 362; Morrison *v.* Kelly, 22 Ill. 612; Rogers *v.* Carey, 47 Mo. 236.

[3] Wallace *v.* Berdell, 97 N. Y. 13.

[4] 1 Wood, Conv. 195.

[5] Hannah *v.* Swarner, 8 Watts, 9.

[6] Tewksbury *v.* O'Connell, 21 Cal. 69.

[7] 1 Wood, Conv. 240; Melvin *v.* Proprs. Locks, etc., 16 Pick. 167; Whelpdale's case, 5 Rep. 119; Butler & Baker's case, 3 Rep. 29; Foley *v.* Howard, 8 Iowa, 56; Co. Lit. 3 *a*.

[8] Butler & Baker's case, 3 Rep. 26; 1 Wood, Conv. 240.

[9] Co. Lit. 3 *a*.

grantee to retain it for him, it is held to constitute an effectual delivery.[1]

§ 2173. **Delivery to first of Successive Takers.** — Where the deed conveys an estate to one which is defeasible upon contingency, and the same is thereupon to go over to another as a contingent limitation, or there is a contingent remainder limited after the expiration of a particular estate, a delivery of the deed to the first taker is a delivery as to all who may be to take under it.[2] And a remainder-man may take under a deed-poll delivered to the tenant of the particular estate, though a stranger to the deed.[3]

§ 2174. **Assignments for Benefit of Creditors. — Presumption of Assent.** — In the case of an assignment in insolvency, the court will presume an acceptance without any actual acceptance having been made. Of this class is Merrills *v.* Swift, where the deed took precedence of an attachment, though not actually received and accepted by the creditor till after an attachment made.[4]

§ 2175. **Escrow.** — While such is the effect of a delivery, where it is made with an intent to pass a present title, there may be a conditional delivery where the deed, though delivered, will not take effect until the happening of some condition annexed thereto. A deed thus delivered is called an *escrow*.[5]

§ 2176. **Deed never an Escrow if delivered to Grantee.** — But a deed can never be an escrow if delivered to the grantee himself, unless for the express purpose of being handed to another person, even though accompanied with an express condition, and not to take effect unless such condition is complied with. The title will nevertheless pass by such delivery.[6] It has ac-

[1] Turner *v.* Whidden, 22 Me. 121 ; Stewart *v.* Weed, 11 Ind. 94 ; Guard *v.* Bradley, 7 Ind. 600 ; Western R. R. Corp. *v.* Babcock, 6 Met. 346 ; Guess *v.* S. B. Ry. Co., 40 S. C. 450 ; s. c. 19 S. E. Rep. 68.

[2] Folk *v.* Varn, 9 Rich. Eq. 303.

[3] Phelps *v.* Phelps, 17 Md. 134.

[4] Merrills *v.* Swift, 18 Conn. 257 ; Wilt *v.* Franklin, 1 Binn. 502 ; Tompkins *v.* Wheeler, 16 Pet. 119.

[5] Termes de la Ley, "Escrow."

[6] Shep. Touch. 59 ; Whyddon's case, Cro. Eliz. 520 ; Fairbanks *v.* Metcalf, 8 Mass. 230, 238; McCann *v.* Atherton, 106 Ill. 31 ; Brown *v.* Reynolds, 5 Sneed, 639 ; Cin., Wil. & Z. R. R. Co. *v.* Iliff, 13 Ohio St. 249–254. But see, as to conditional delivery of bonds, 1 Wood, Conv. 193 ; Hawksland *v.* Gatchel, Cro. Eliz.

cordingly been held, that, if one of two obligors in an instrument deliver it to the obligee, it is an effectual delivery as to both. So if an obligor execute an instrument and deliver it to his co-obligor, or retain it himself, as an escrow, to be delivered to the obligee, it will not have that character. The importance of this will be perceived when it is recollected, that, after a deed has been delivered as an escrow, it is no longer revocable by the maker, but the same will take effect whenever the condition shall have happened or been complied with, upon which it is to be finally delivered.[1] If the delivery is made to the party, no matter what may be the form of the words, the delivery is absolute, and the deed takes effect presently as the deed of the grantor, discharged of the conditions upon which the delivery was made.[2] But where a composition deed was executed on part of a surety, and delivered to a creditor, to be void if the creditors did not sign it, the creditor taking it to get their signatures, it was held to be an escrow of no binding obligation unless all the creditors signed it.[3] And this will be true, though, after its delivery in the manner above stated, the deed, by the agreement of the parties, be placed in a stranger's hands, to remain till they call for it. It must, after all, depend, in each case, upon whether the parties at the time meant it to be a delivery to take effect presently. As where a deed was handed to the grantee, to place it in a third person's hands to keep as an escrow, and it was so received and transmitted, no title vested in the grantee till a second delivery.[4] But, in order to

835, which is denied in Thoroughgood's case, 9 Rep. 137; Lawton *v.* Sager, 11 Barb. 349; Com. Dig. Fait, A. 4; Williams *v.* Green, F. Moore, 642; Holford *v.* Parker, Hob. 246, and Williams's note; Foley *v.* Cowgill, 5 Blackf. 18; Gilbert *v.* No. Am. F. Ins. Co., 23 Wend. 43; Firemen's Ins. Co. *v.* McMillan, 29 Ala. 160; Ward *v.* Lewis, 4 Pick. 520; Jayne *v.* Gregg, 42 Ill. 416; Blake *v.* Fash, 44 Ill. 305.

[1] Millett *v.* Parker, 2 Met. (Ky.) 608, 616; Worrall *v.* Munn, 5 N. Y. 229; Wight *v.* Shelby R. R. Co., 16 B. Mon. 4. See Madison, etc. P. R. Co. *v.* Stevens, 10 Ind. 1.

[2] Worrall *v.* Munn, 5 N. Y. 229. See Herdman *v.* Bratten, 2 Harring. 396; State *v.* Chrisman, 2 Ind. 126; Madison, etc. P. R. Co. *v.* Stevens, 10 Ind. 1; Black *v.* Shreve, 13 N. J. Eq. 458; Cin., W. & Z. R. R. Co. *v.* Iliff, 13 Ohio St. 249; Moss *v.* Riddle, 5 Cranch, 351; Lloyd *v.* Giddings, 7 Ohio, pt. 2, 52. But *contra*, Bibb *v.* Reid, 3 Ala. 88.

[3] Johnson *v.* Baker, 4 Barn. & Ald. 440. See Black *v.* Shreve, 13 N. J. Eq. 462.

[4] Shep. Touch. Prest. ed. 59; Den d. Gibson *v.* Partee, 2 Dev. & B. 530;

have a deed have the character and qualities of an escrow, it must be completely executed in all respects, except the formal delivery.[1]

§ 2177. **Deed delivered to Third Person not always an Escrow.** — But a deed is a presently operative deed, and not an escrow, though placed in a stranger's hands, with a direction to deliver it to the grantee at some future day, or upon a certain event, unless there be some condition connected with such delivery, the happening of which, by the terms of the authority in the receiver, must precede delivery to the grantee, and, until then, the deed is to have no effect. Such, in fact, was the delivery in the cases, above cited, of Hatch *v.* Hatch, Belden *v.* Carter, and Doe *v.* Knight; and the law upon the subject is thus stated by Perkins: "If I deliver an obligation or other writing unto a man as my deed, to deliver unto him to whom it is made, when he shall come to York, it is my deed presently; and if he shall deliver it to him before he come to York, yet I shall not avoid it; and if I die before he come to York, and afterwards he cometh to York, and he delivereth the deed unto him, it is clearly good and my deed, and that it cannot be if it were not my deed before my death."[2] Where the grantor handed the deed to a third person to hold for the grantee, but the holder never delivered it unto the grantee till after the grantor's death, it was held that the estate vested in the grantee upon the handing of the deed to the bailee, although he was not employed by the grantee to receive it.[3] But it does not take effect until the second delivery, unless the grantor in the mean time becomes incapable of delivering the deed, when it relates back to the first delivery.[4] Whether putting a deed into a third person's

Simonton's Estate, 4 Watts, 180; Murray *v.* Stair, 2 Barn. & C. 82; Jackson *v.* Sheldon, 22 Me. 569; Gilbert *v.* No. Am. F. Ins. Co., 23 Wend. 43. But see this questioned in Braman *v.* Bingham, 26 N. Y. 483; Fairbanks *v.* Metcalf, 8 Mass. 239.

[1] Deardorff *v.* Foresman, 24 Ind. 481; 14 Am. L. Reg. o. s. 551; *ante*, § 2156.

[2] Perkins, § 143; Shep. Touch. Prest. ed. 58, 59. See Wheelwright *v.* Wheelwright, 2 Mass. 447. But see this doctrine doubted, State Bank *v.* Evans, 15 N. J. L. 155; and see 4 Kent, Com. 455, note. But it is fully sustained by Foster *v.* Mansfield, 3 Met. 412; O'Kelly *v.* O'Kelly, 8 Met. 436; Murray *v.* Stair, 2 Barn. & C. 82; Shaw *v.* Hayward, 7 Cush. 175.

[3] Mather *v.* Carless, 103 Mass. 568.

[4] Foster *v.* Mansfield, 3 Met. 412, 415.

hands is a present delivery, or an *escrow*, depends upon the *intent* of the parties. If the delivery depends upon the performance of a *condition*, it is an *escrow;* otherwise it is a *present grant*, though it be to wait the lapse of time, or happening of an event.[1] If it is to be delivered at the grantor's death, it is a present deed; and a quitclaim by the grantee, intermediate, would pass his estate. But if it be expressly delivered as an *escrow*, to be delivered at a future time, it is not a present conveyance.[2] If it is delivered in escrow, to be handed to the grantee on the happening of a condition, it is held that the delivery becomes absolute on the happening of the condition, after the death of the grantor.[3] But it was held by Denio, J., that though, in the case supposed, the delivery at the grantee's death would retroact so as to make the estate the grantee's from the first delivery, it would not take effect so as to pass the estate until the second delivery.[4] But to have it a delivery in the case supposed, so as to pass an estate, the grantor must absolutely part with the control or dominion over the deed. If it is subject to be recalled by the grantor before delivery, it is not held to be a delivery.[5] Thus, where A made a deed to his sister, and left it in a third person's hands without her knowledge, and at his death devised two acres of his land to B, and, after his death, to his sister, "together with other lands I have already conveyed her," it was held to be no delivery of the deed, and that the sister took by will, having reference to the deed for what he had devised to her.[6]

§ 2178. **Form of Delivery to make an Escrow.** — Writers, accordingly, are careful to caution persons making deeds, and

[1] Thus where a bond signed by two sureties was delivered by them to the surrogate to have the third surety sign. Held, a present delivery, as the signing by the third was no condition. Ordinary *v.* Thatcher, 41 N. J. L. 403.

[2] Foster *v.* Mansfield, 3 Met. 414, 415; Price *v.* Pittsburgh, Ft. W., etc. R. R. Co., 34 Ill. 13. See 2 Roll. Abr. 24, pl. 17. Tooley *v.* Dibble, 2 Hill, 641; Braman *v.* Bingham, 26 N. Y. 483; Hathaway *v.* Payne, 34 N. Y. 106, 107; Cook *v.* Brown, 34 N. H. 465.

[3] Bostwick *v.* McEvoy, 62 Cal. 496; Baker *v.* Baker, 159 Ill. 394; s. c. 42 N. E. Rep. 867; Hoffmire *v.* Martin, 29 Oreg. 240; s. c. 45 Pac. Rep. 754.

[4] Hathaway *v.* Payne, 34 N. Y. 106.

[5] Shirley *v.* Ayres, 14 Ohio, 310; Cook *v.* Brown, 34 N. H. 465; Fitch *v.* Bunch, 30 Cal. 213; Deardorff *v.* Foresman, 24 Ind. 481; 14 Am. L. Reg. o. s. 545; Berry *v.* Anderson, 22 Ind. 36; Millett *v.* Parker, 2 Met. (Ky.) 613.

[6] Thompson *v.* Lloyd, 49 Penn. St. 128.

wishing to deliver them as *escrows*, to use a proper form of words expressive of their intent; such, for instance, as, "I deliver this as an escrow to you to keep until such a day, and upon condition, etc.; and then you shall deliver this escrow to him as my deed." It probably would not be necessary to use any technical form of words in such a case, and would be sufficient if the party making the deed, when he placed it in a third party's hands, declared, in intelligible terms, that it was not to be deemed or delivered as his deed until some future time, and on the happening of some future event; thereby expressly negativing the intention to treat it as his present deed, or as being to take effect presently.[1]

§ 2179. **Deed in Escrow ineffectual until Condition performed.** — When a deed has been delivered as an escrow, it has no effect, as a deed, until the condition has been performed,[2] and no estate passes until the second delivery,[3] though, when such second delivery has been made, it relates back to the first, for many purposes, and is considered as a consummation of an inchoate act then begun.[4] But if, in the mean time, the estate should be levied upon by a creditor of the grantor, he would hold by virtue of such levy, in preference to the grantee in the deed.[5] And so the grantee would take subject to any grant made by the grantor after the delivery in *escrow* and before the happening of the condition upon which the escrow would become a deed, e. g. the grant of a right of way over the land in ques-

[1] Shep. Touch. Prest. ed. 58, 59; 1 Wood, Conv. 196; Jackson d. Gratz *v.* Catlin, 2 Johns. 248, 259; Fairbanks *v.* Metcalf, 8 Mass. 230, 238; Jackson *v.* Sheldon, 22 Me. 569; White *v.* Bailey, 14 Conn. 271. A deed sent enclosed in a letter to a third person, to be delivered to grantee upon his paying a certain sum, was an escrow. Clark *v.* Gifford, 10 Wend. 310; Gilbert *v.* No. Am. F. Ins. Co., 23 Wend. 43; State Bank *v.* Evans, 15 N. J. L. 155; Millett *v.* Parker, 2 Met. (Ky.) 616; Shoenberger *v.* Hackman, 37 Penn. St. 87; State *v.* Peck, 53 Me. 293; Johnson *v.* Baker, 4 Barn. & Ald. 440.

[2] Com. Dig. Fait, A. 4; Hinman *v.* Booth, 21 Wend. 267; Fairbanks *v.* Metcalf, 8 Mass. 230, 238; Perk. § 138; Touch. 59; Black *v.* Shreve, 13 N. J. Eq. 458.

[3] Shep. Touch. Prest. ed. 59; Green *v.* Putnam, 1 Barb. 500, 504; Frost *v.* Beekman, 1 Johns. Ch. 297; Everts *v.* Agnes, 4 Wis. 351; James *v.* Vanderheyden, 1 Paige, 385.

[4] 1 Wood, Conv. 197; Ruggles *v.* Lawson, 13 Johns. 285; Shep. Touch. 59, 73; Butler & Baker's case, 3 Rep. 35; Shirley *v.* Ayres, 14 Ohio, 307.

[5] Jackson d. Russell *v.* Rowland, 6 Wend. 666; Frost *v.* Beekman, 1 Johns. Ch. 297; Jackson d. Gratz *v.* Catlin, 2 Johns. 248.

tion to a railroad company.[1] Nor does such second delivery carry a right to the intermediate rents accruing between the first and second delivery.[2] But whether the deed, when thus delivered, shall retroact so as to have the same effect upon intermediate rights as if fully delivered at first, has, in some cases, been held to depend upon the intention of the parties, and in others to turn upon the point, that such a construction was necessary to protect the grantee against intervening rights.[3]

§ 2180. **Effect of Delivery before Condition.** — If the deed is delivered before the previous condition is performed, it will not be the deed of the grantor, or have any effect as such.[4] But it may be used as evidence of the contract to sell and purchase the land, and, in that way, have effect given to it, under the statute of frauds, as a writing signed by the parties.[5] The effect to be given to the obtaining possession of a deed delivered as an escrow, before the condition is performed, was fully considered in a case where the grantee obtained such possession by fraud before the condition had been performed, and then conveyed the estate to an innocent purchaser. The court say: "Until the performance of the condition, it (the deed) must remain a mere scroll in writing, of no more efficacy than any other written scroll; but when, upon the performance of the condition, it is delivered to the grantee or his agent, it then becomes a deed to all intents and purposes, and the title passes from the date of the delivery. The delivery, to be valid, must be with the assent of the grantor. If the grantee obtain possession of the escrow, without performance of the condition, he obtains no title thereby, because there has

[1] Blair *v.* St. Louis, Han., etc. R. R. Co., 24 Fed. Rep. 539.

[2] Perkins, § 10; 3 Prest. Abst. 65.

[3] Price *v.* Pittsburgh, Ft. W., etc. R. R. Co., 34 Ill. 34, 36; Shirley *v.* Ayres, 14 Ohio, 310.

[4] Perkins, § 138; but see id. § 144; Stiles *v.* Brown, 16 Vt. 563; Jackson *v.* Sheldon, 22 Me. 569. See Hooper *v.* Ramsbottom, 6 Taunt. 12; State Bank *v.* Evans, 15 N. J. L. 155; Rhodes *v.* Gardiner Sch. Dist. No. 14, 30 Me. 110, unless the grantee holding it convey the land to a *bona fide* purchaser ignorant of the fact as to the delivery. Blight *v.* Schenck, 10 Penn. St. 285; Peter *v.* Wright, 6 Ind. 183; Souverbye *v.* Arden, 1 Johns. Ch. 240; Berry *v.* Anderson, 22 Ind. 40. Even an innocent purchaser cannot hold in such case. Smith *v.* So. Royalton Bank, 32 Vt. 341; People *v.* Bostwick, 32 N. Y. 450; Illinois C. R. R. Co. *v.* McCullough, 59 Ill. 170.

[5] Cagger *v.* Lansing, 57 Barb. 421.

been no delivery with the assent of the grantor, which assent is dependent upon compliance with the condition." "The recording of an escrow does not make it a deed." They held that the depositary of an escrow was as much the agent of the grantee as the grantor. "He is as much bound to deliver the deed, on performance of the condition, as he is to withhold it until performance." And, being thus in the hands of the agent of the grantee, the deed takes effect, the moment the condition is performed, without any formal delivery into the hands of the grantee.[1] The grantee in the case, after obtaining possession of the deed, had it recorded, and then conveyed the estate to an innocent purchaser. But the court, upon full consideration, held that the purchaser acquired nothing by his deed, because his grantor never acquired any title by gaining possession of the escrow. They liken it to a deed which the grantee had stolen, where no title is gained thereby; and distinguish it from one obtained by fraud from the grantor himself, where a title does pass by the actual delivery by the grantor.[2] A grantor may deliver his deed to the agent of the grantee, to be delivered to the grantee if certain conditions are performed; otherwise to return it to the grantor: and if the agent accept it on those terms, the delivery will not give effect to the deed unless the condition is performed.[3]

§ 2181. **Effect of Second Delivery of Deed in Escrow.** — The instances given in the books illustrating some of these propositions, seem to imply the necessity of a second formal delivery to the party who is to take by the deed, unless such a construction would defeat the intent of the parties. Thus it is said in the Butler and Baker's case, that, "to some intent the second delivery hath relation to the first delivery, and in some not; and yet, in truth, the second delivery hath all its force by the first delivery, and the second is but an exe-

[1] Shirley *v.* Ayres, 14 Ohio, 308.

[2] Everts *v.* Agnes, 4 Wis. 343; s. c. 6 Wis. 453; Black *v.* Shreve, 13 N. J. Eq. 458; Dyson *v.* Bradshaw, 23 Cal. 536; Abbott *v.* Alsdorf, 19 Mich. 157; Harkreader *v.* Clayton, 56 Mich. 383. *Contra*, Schurtz *v.* Colvin, 55 Ohio St. 274; s. c. 45 N. E. Rep. 527.

[3] Cin., Wil. & Z. R. R. Co. *v.* Iliff, 13 Ohio St. 249–254; Southern L. Ins., etc. Co. *v.* Cole, 4 Fla. 359.

cution and consummation of the first. And therefore, in such case of necessity, *ut res magis valeat quam pereat*, it shall have relation, by fiction, to be made his deed *ab initio* by force of the first delivery. And therefore, if, at the time of the first delivery, the lessor be a *feme sole*, and, before the second delivery, she take a husband; or if, before the second delivery, she dieth; in this case, if the second delivery shall not have relation to this intent to make it the deed of the lessor *ab initio*, but only from the second delivery, the deed in both cases should be void, and therefore, in such case, for necessity, and *ut res magis valeat quam pereat*, to this intent, by fiction of law, it shall be a deed *ab initio;* and yet, in truth, it was not his deed till the second delivery." And the same rule applies if the party who makes the deed dies before the event happens when it is to be delivered.[1] And, in such case, if money is paid as a performance of the condition after the grantor's death, the same will go to the heirs, and not to the personal representatives of the grantor.[2] But if a *feme covert* deliver a deed as an escrow, and become discovert before the second delivery, such second delivery would give no validity to the deed, the first being void.[3]

§ 2182. **Of cancelling Deeds to revest Title.** — There is a class of cases growing out of the conveyance of lands which is required to be noticed here, as they seem to conflict with some of the doctrines hereinbefore stated. Thus it has been laid down as a general proposition, that, upon the execution and delivery of a deed, the title of the grantor passes to and vests in the grantee; and that no one ceases to be the owner of an estate, the soil and freehold of which have once vested in him, by mere abandonment of the same, without some deed

[1] 3 Prest. Abst. 65; Butler & Baker's case, 3 Rep. 36; Perryman's case, 5 Rep. 84 *b*; Perkins, §§ 11, 138–140; Shep. Touch. Prest. ed. 59; Jackson d. Gratz *v.* Catlin, 2 Johns. 248, 259; Hatch *v.* Hatch, 9 Mass. 307, 310; 1 Wood, Conv. 197; Jackson d. Russell *v.* Rowland, 6 Wend. 666; Holford *v.* Parker, Hob. 246 *a*, and Williams' note; Shirley *v.* Ayres, 14 Ohio, 309; Ruggles *v.* Lawson, 13 Johns. 285. See Carr *v.* Hoxie, 5 Mason, C. C. 60; Evans *v.* Gibbs, 6 Humph. 405; Frost *v.* Beekman, 1 Johns. Ch. 288; Hall *v.* Harris, 5 Ired. Eq. 303; Price *v.* Pittsburgh, Ft. W., etc. R. R. Co., 34 Ill. 36.

[2] Teneick *v.* Flagg, 29 N. J. L. 25.

[3] Butler & Baker's case, 3 Rep. 34; Com. Dig. Fait, B. 5; Jennings *v.* Bragg, Cro. Eliz. 447.

of conveyance. But cases like the following have occurred, where the title of an owner has been held to pass to a third person without any such deed. Thus, where A made his deed to B, who, having made sale of the estate to C, surrenders up his deed to A before it is recorded, and A, at his request, makes a new deed to C, it has been held to convey a good title to C. Nor, when analyzed, is there anything in this necessarily at variance with the familiar principles of law. The grantor would, of course, be estopped to deny his own deed to the second grantee; while the first grantee, having voluntarily destroyed the evidence of his title, would not be admitted to impeach that of a purchaser, whom he had induced to accept and pay for a deed from the grantor in whom the record title remained.[1] But where a deed had been delivered, but not recorded, and the grantor, about a month afterwards, took the deed, and, with the knowledge and assent of the grantee, inserted, "saving and excepting the saw-timber on the premises," and the deed was then recorded, it was held to be inoperative to reconvey the property in the timber, which had already passed to the grantee by the deed.[2] But where a mortgagee sold and assigned the mortgage-note and mortgage, and afterwards purchased them again, and his assignee cancelled the first assignment and delivered back the deed to him, it was held that the mortgagee was thereby reinvested in his rights as mortgagee.[3] But such redelivery and cancellation would not have the effect to defeat the grantee's title unless it revest it in the *grantor*.[4] But nothing short of actual cancellation of the deed would affect the title of the grantee.[5] If the first deed be to the wife, and is, by her agreement, given up and cancelled, and a new deed be made by the grantor to the husband, it does not operate to divest the estate of the wife,

[1] Commonwealth *v.* Dudley, 10 Mass. 403; Holbrook *v.* Tirrell, 9 Pick. 105; Trull *v.* Skinner, 17 Pick. 213; Lawrence *v.* Stratton, 6 Cush. 163, 169; Patterson *v.* Yeaton, 47 Me. 314. See Parker *v.* Kane, 22 How. 1, 18; Steel *v.* Steel, 4 Allen, 423; Blake *v.* Fash, 44 Ill. 305; Thompson *v.* Thompson, 9 Ind. 328; Speer *v.* Speer, 7 Ind. 178; Dodge *v.* Dodge, 33 N. H. 487; Sawyer *v.* Peters, 50 N. H. 143; Blaney *v.* Hanks, 14 Iowa, 400; Parker *v.* Kane, 4 Wis. 12.

[2] Booker *v.* Stivender, 13 Rich. 85.

[3] Howe *v.* Wilder, 11 Gray, 267.

[4] Newbury Bank *v.* Eastman, 44 N. H. 438.

[5] Barrett *v.* Barron, 13 N. H. 150.

and create one in the husband.[1] So, if such original deed had been to two tenants in common, and the same had been given up by one to be cancelled, but not assented to by the other, and a new deed made, it would be effectual to convey one undivided half of the estate.[2] The cases in general, however, agree that mere cancelling or delivering back the grantor's deed does not divest the grantee's title.[3] But where a deed was made to one upon condition, stated in the deed, that he should have the term of two years in which to determine whether he would complete the bargain, and take the land, and pay the purchase-money, with a right on his part to rescind the bargain, "in which event the land was to revert to the grantor," it was held, that the grantee might rescind the bargain by parol, and, upon doing so, the title to the land would revert accordingly.[4] However, it is plain that in this case the land reverted by force of the deed.

§ 2183. **What is equivalent to Livery of Seisin.** — At common law, in order to pass a title effectually by a deed of feoffment, it was requisite that livery of seisin of the land should be made to the feoffee.[5] But, as has been heretofore explained, the statute of uses obviated the necessity of any formal livery of seisin; and as, therefore, all modern deeds derive their force and validity from this statute, this ceremony has grown into practical disuse, as a part of the process of a conveyance, except in those cases where the grantor, being disseised, enters to regain his seisin, in order to give effect to his deed,

[1] Wilson *v.* Hill, 13 N. J. Eq. 143.

[2] Lawrence *v.* Stratton, *supra*. See Speer *v.* Speer, 7 Ind. 178.

[3] Holbrook *v.* Tirrell, 9 Pick. 108; Gilbert *v.* Bulkley, 5 Conn. 262; Botsford *v.* Morehouse, 4 Conn. 550; Fawcetts *v.* Kimmey, 33 Ala. 264; Conway *v.* Deerfield, 11 Mass. 332; Ward *v.* Lumley, 5 H. & N. 87, 94, and note to Am. ed.; Kearsing *v.* Kilian, 18 Cal. 491; Rogers *v.* Rogers, 53 Wis. 36. See 1 Greenl. Ev. § 265; Steel *v.* Steel, 4 Allen, 422; Holmes *v.* Trout, 7 Pet. 171; Wilson *v.* Hill, 13 N. J. Eq. 143; Patterson *v.* Yeaton, 47 Me. 308; Fonda *v.* Sage, 46 Barb. 122; Howard *v.* Huffman, 3 Head, 562, though done before recording; Hall *v.* McDuff, 24 Me. 312; Parker *v.* Kane, 4 Wis. 12; Slaughter *v.* Bernards, 97 Wis. 184; s. c. 72 N. W. Rep. 977; Bailey's adm'rs *v.* Campbell, 82 Ala. 342; s. c. 2 So. Rep. 644; Potter *v.* Adams, 125 Mo. 118; s. c. 28 S. W. Rep. 490; Hyne *v.* Osborn, 62 Mich. 235; s. c. 28 N. W. Rep. 821.

[4] Hughes *v.* Wilkinson, 37 Miss. 482.

[5] 1 Wood, Conv. 241; Co. Lit. 266 *b*; 2 Bl. Com. 318; Jackson d. Gouch *v.* Wood, 12 Johns. 74; Shep. Touch. 54.

which he delivers to the grantee upon the premises, so as to pass the legal seisin.[1] And where a disseisee entered upon the land, and delivered a deed while there, it was held to be valid, although the purchaser knew the title to be in dispute.[2] It will, moreover, be found, that in many of the States the execution and recording of a deed is made to perform the office of livery of seisin at common law.[3]

§ 2184. **Of the Doctrine of Relation in Deeds.** — There are cases where the transaction is not complete and effectual in itself to convey a title to lands, but, by being connected with other acts or transactions as parts of the one under consideration, it becomes effective by the relation which the law creates between them, whereby they are made to partake of the character of a single and integral act. It may be difficult to classify these cases; but a reference to a few of them will give a general idea of what is here meant. One of these would be the case of a sale of premises made by a sheriff, upon execution, but no deed delivered till a subsequent period, during which the judgment debtor had died. When the deed is given, it has relation back to the sale, and is considered as then taking effect, and its validity is not affected by the intermediate death of the debtor. The rule stated in such cases is, "Where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred, and to this the other acts shall have relation."[4] Several cases are mentioned in the one cited; and the language of Kent, C. J., in another case,[5] was: "A conveyance will, in many cases, be deemed to relate back to the time when the agreement was concluded, and render valid any intermediate disposition of the land."[6] In Landes *v.* Brant,

[1] *Ante*, § 1957; Co. Lit. 266 *b*; Shep. Touch. 54.

[2] Warner *v.* Bull, 13 Met. 1.

[3] Higbee *v.* Rice, 5 Mass. 352; Caldwell *v.* Fulton, 31 Penn. St. 483; Wyman *v.* Brown, 50 Me. 160; Bryan *v.* Bradley, 16 Conn. 481; Williamson *v.* Carlton, 51 Me. 452; McMahon *v.* Rowe, 114 Mass. 146.

[4] Jackson d. De Forest *v.* Ramsay, 3 Cow. 75, 80; Viner's Ab. Relation, E.

[5] Johnson *v.* Stagg, 2 Johns. 520. See also Jackson d. Rensselaer Co. New Loan Off. *v.* Bull, 1 Johns. Cas. 81; Jackson d. Noah *v.* Dickenson, 15 Johns. 309.

[6] Crowley *v.* Wallace, 12 Mo. 143, in its facts and decision was identical with that of Jackson d. De Forest *v.* Ramsay, 3 Cow. 75.

the title in question was an imperfect one, in the original claimant, under the Spanish government; and a creditor of the one holding this title seized and sold his title on execution; and, subsequently to this, the United States confirmed the title to the original claimant. It was held, that, by relation, he was the real owner when the sale was made, and consequently the purchaser under the sheriff's sale held the land against the devisees of the original claimant. The court quote from Cruise with approbation, as applicable to such cases: "There is no rule better founded in law, reason, and convenience, than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation."[1] Another class of cases is one already mentioned, where deeds have been delivered as escrows, and, before the event happens upon which they are to be delivered, the grantor dies, or, if a *feme sole*, marries. In such cases, when the contingency happens, the deed is delivered, and takes effect by relation from the date of the first delivery as an escrow.[2]

§ 2185. **Doctrine not applied to work Injustice.** — But the case of Frost *v.* Beekman further sustains the proposition, that courts will not apply the doctrine of relation, when by so doing they will work injustice to the rights of innocent parties acquired between the events which it is proposed thus to unite by relation, nor by making that tortious which was lawful originally. Thus, though a deed, made in pursuance of a previous contract to sell, may, as between the parties to the same, relate back to the date of the contract, it will not be allowed to do so to the injury of intermediate innocent purchasers, or strangers who have acquired an interest. The doctrine, as stated by Thompson, J., is: "It is a general rule with respect to the doctrine of relation, that it shall not do wrong to strangers: as between the same parties, it may be

[1] Landes *v.* Brant, 10 How. 348, 373. See the same doctrine, Barr *v.* Gratz, 4 Wheat. 213; Cavender *v.* Smith, 5 Iowa, 157; s. c. 3 Greene (Iowa), 349; Rogers *v.* Brent, 5 Gilm. 573.

[2] Frost *v.* Beekman, 1 Johns. Ch. 297; Butler & Baker's case, 3 Rep. 35. See Foster *v.* Mansfield, 3 Met. 412; O'Kelly *v.* O'Kelly, 8 Met. 436; Viner's Ab. Relation, E.

adopted for the advancement of justice."[1] But a sale and deed made by the owner of a particular estate upon which depends a contingent remainder will not operate, by relation to defeat the remainder, if the deed is not actually delivered until after the same has vested.[2]

§ 2186. **Sheriff's Deed relates back to Attachment.** — There is, however, a large class of cases where the doctrine of relation applies to its full extent; as, for instance, where an execution title relates back to the time of the attachment creating the lien, which is perfected by the sale or levy under such execution, and cuts off intermediate conveyances.[3]

§ 2187. **Deeds of Confirmation.** — A deed of confirmation may make a voidable or defeasible estate good, but does not strengthen a void one. If a disseisee make a deed of confirmation to his disseisor, it is commensurate with the estate of the disseisor, which is a fee; and it would confirm a fee in him, though it contain no words of inheritance.[4]

§ 2188. **Deeds-poll and Indentures.** — There are two kinds of deeds known to the law, — deeds-poll and indentures, — though the distinction between them is far less important than it was once deemed to be, when, to prevent a commission of fraud, it was considered necessary to write the two parts of a mutual agreement, or the duplicate of an instrument which was to be executed by two persons, on the same piece of parchment or paper, and then to cut them apart with an irregular line, so that the edge of one part would fit into that of the other, *instar dentium*, and thus establish the authenticity of the several parts. This cutting of the paper or parchment is rarely, if ever, practised now; and the word *indenture* is used to describe a deed to which two or more persons are parties, and in which these enter into reciprocal and corresponding

[1] Vancourt *v.* Moore, 26 Mo. 92; Jackson d. Griswold *v.* Bard, 4 Johns. 230, 234; Fite *v.* Doe d. Bingham, 1 Blackf. 127, 130; Samson *v.* Thornton, 3 Met. 275; Viner's Ab. Relation, K. 4; Butler & Baker's case, 3 Rep. 29.

[2] Thompson *v.* Leach, 2 Vent. 200.

[3] Smith *v.* Allen, 1 Blackf. 22; Heywood *v.* Hildreth, 9 Mass. 393; Taylor *v.* Robinson, 2 Allen, 564; Viner's Ab. Relation, E.; Pierce *v.* Hall, 41 Barb. 142.

[4] Co. Lit. 295 *b*, 296 *b*; Viner's Ab. Confirmation, Y., pl. 5; People *v.* Law, 22 How. Prac. 125, 126; Gilbert, Ten. 69; Knight *v.* Dyer, 57 Me. 177; Gallatian *v.* Cunningham, 8 Cow. 375.

grants or obligations towards each other: whereas a deed-poll is properly one in which only the party making it executes it, or binds himself by it as a deed, though the grantors or grantees therein may be several in number; the ordinary purpose of a deed-poll being to transfer the rights of the grantor to the grantee.[1] Indentures are bipartite, tripartite, and the like, according to the number of parts of which they consist, each of which would have as complete effect as the whole together. This form of deeds began to be used in the time of John and Henry II., and has been in use ever since that period.[2] It was formerly more usual for each party to sign but one of these parts; though this was done, as it was called, *interchangeably*, in which case the part which was executed by the grantor was usually called the "original," and the other the "counterpart." Of late, however, it has become common for each party to execute all the parts, which thereby all become original.[3]

§ 2189. **Deeds-poll** may generally be said to include every kind of deed which is not an indenture.[4] They are usually in form in the first person; but they are equally good, though made in the third person; and an indenture may be made in the first or the third person, though most commonly the latter form is adopted.[5] Some of these deeds contain matters of grant or gift, under which are included feoffments, gifts, bargains and sales, grants and leases. Some of them contain matters of discharge, such as surrenders, releases, acquittances, defeasances, and the like.[6] But though a deed, in terms, be called an indenture, and be so in form, except in requiring something from both parties named, yet if it is prepared and intended for the grantor only to execute it, and he does so, it is a valid deed as to him.[7]

[1] Shep. Touch. 50; Walk. Am. Law, 576; Wms. Real Prop. 125; Dyer *v.* Sanford, 9 Met. 395, 406.

[2] Com. Dig. Fait, C. 1; Lit. § 370; Shep. Touch. 50.

[3] Co. Lit. 229 *a*, note 140; Shep. Touch. 53; Dudley *v.* Sumner, 5 Mass. 438.

[4] Co. Lit. 229 *a*; Com. Dig. Fait, D. 1; Giles *v.* Pratt, 2 Hill (S. C.), 439.

[5] Shep. Touch. 51, 53.

[6] Shep. Touch. 51.

[7] Shep. Touch. Prest. ed. 53 and note; Foster *v.* Mapes, Cro. Eliz. 212; Hallett *v.* Collins, 10 How. 174; Walk. Am. Law, 376; Hipp *v.* Huchett, 4 Tex. 20, 25.

§ 2190. **Party may be Covenantor without signing.** — An indenture has been said to be the stronger deed of the two, especially in its effect in working an estoppel.[1] The doctrine has been maintained by some, that a party to an indenture, made and executed by another to him, will become a covenantor, and liable as such, though he may not sign or seal the deed, if he is named in it and accepts it, and it contains covenants, which, by the terms of the deed, he is to perform. This point is very elaborately argued and expressly decided in Finley *v.* Simpson in favor of holding such party bound as a covenantor, and the position of Mr. Platt to the contrary is controverted.

§ 2191. **Remedy against Grantee bound by Deed-poll.** — In Massachusetts, the remedy against a grantee in a deed-poll, for failing to perform a duty prescribed in such deed for him to perform, would be assumpsit, and not covenant; and the same seems to be true where the instrument is in form an indenture, if it is not executed by the party to be charged.[2] And the same is held in Pennsylvania.[3] But in New York the court held, that, if in a deed-poll there is a duty to be performed by the grantee, covenant will lie against him though he do not sign the deed, on the ground, that, by accepting the deed, he is estopped to deny that he covenants to do what the deed requires of him, and that, by accepting the deed, he adopts the seal as his own.[4] The rule in Connecticut is the same as in Massachusetts.[5] And some of the cases hold, that a third party in whose favor a promise is made may maintain assumpsit upon it, if broken, although no party to the instrument containing the covenant or agreement.[6] But a different doctrine is maintained in Massachusetts.[7]

§ 2192. **Both Parties speak in Indentures.** — The words of

[1] Finley *v.* Simpson, 22 N. J. L. 311, 332; Platt, Cov. 18. See Shep. Touch. 52.

[2] Newell *v.* Hill, 2 Met. 180; Goodwin *v.* Gilbert, 9 Mass. 510; Nugent *v.* Riley, 1 Met. 117; Johnson *v.* Muzzy, 45 Vt. 419.

[3] Maule *v.* Weaver, 7 Penn. St. 329.

[4] Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35.

[5] Hinsdale *v.* Humphrey, 15 Conn. 431. See Burnett *v.* Lynch, 5 B. & C. 589.

[6] Van Schaick *v.* Third Av. R. R. Co., 38 N. Y. 354; Lawrence *v.* Fox, 20 N. Y. 268; Thorp *v.* Keokuk Coal Co., 48 N. Y. 256, 257.

[7] Mellen *v.* Whipple, 1 Gray, 317; *ante*, § 1139.

an indenture are the words of either party, and though spoken as the words of one only, they are not his words alone, but may be applied to the other party also, or exclusively, if they more properly belong to him; for every word that is doubtful is to be attributed to him to whom the intent of the parties shows it is most applicable.[1]

[1] Shep. Touch. 52.

CHAPTER XCIX.

TITLE BY PRIVATE GRANT — ACKNOWLEDGMENT AND RECORD OF DEEDS.

§ 2193. Of the record or registration of deeds.
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§ 2193. **Of the Record or Registration of Deeds.** — [In this country deeds are recorded, with very few exceptions, not for the purpose of giving them validity, but to give notice of their existence and contents to subsequent purchasers, who, from the fact of such registration, are put constructively on notice and are deprived of the equities of *bona fide* purchasers for value.] Each State has, in its legislation, provided for officers charged with the duty of making such records, and offices within which these records are to be preserved for reference. And, to guard against imposition in recording instruments which may have

been improperly obtained, each State, except Kansas and Illinois,[1] requires that the free and voluntary execution of the deed should be acknowledged or proved before certain officers or courts, and a certificate thereof be appended to each deed which shall be offered for record, which certificate alone authorizes the register to enter the deed upon the record.[2] And so far as forming a part of a wife's conveyance of her interest is concerned, it is designed to take the place of the old English fine and recovery.[3]

§ 2194. **The Officer taking the Acknowledgment.** — The duty, however, of taking and certifying the acknowledgment of deeds, is a ministerial, and not a judicial one; and it is no objection, therefore, that the officer who takes it stands in so near a relation to the party making the acknowledgment as to render him incompetent to act in a judicial capacity, or that of a juror. But an acknowledgment taken by one interested in the conveyance is not valid.[4] Where the deed shows upon its face that the acknowledgment was taken by a party in interest, it is not a constructive notice, if recorded. But if everything appears fair upon its face, it will be a good notice, though there be some hidden defect.[5] Mere relationship of the officer to one of the parties to the deed, without interest, will not vitiate the acknowledgment.[6] It must be done by the officer within the limits of his appointment; and if done beyond these, it is void.[7] But in Massachusetts and New Hampshire a magis-

[1] In these States, though the registration will be constructive notice to creditors and after-purchasers, an unacknowledged deed cannot be used in evidence unless proved in a manner required by the rules of evidence applicable to such writings (Carpenter *v.* Dexter, 8 Wall. 532); whereas, if acknowledged and recorded, it may be read in evidence without proof of its execution. Simpson *v.* Mundee, 3 Kan. 181; Reed *v.* Kemp, 16 Ill. 445.

[2] Carpenter *v.* Dexter, *supra.*

[3] Morris *v.* Sargent, 18 Iowa, 99.

[4] Wilson *v.* Traer, 20 Iowa, 233; Beaman *v.* Whitney, 20 Me. 413; Withers *v.* Baird, 7 Watts, 227; Groesbeck *v.* Seeley, 13 Mich. 345; Wilson *v.* Traer, 20 Iowa, 231. The officer of a corporation is not interested unless he is also a stockholder. F. S. B. & R. E. E. *v.* Rivers, 36 Fla. 575; s. c. 18 So. Rep. 850.

[5] Stevens *v.* Hampton, 46 Mo. 408.

[6] Welsh *v.* Lewis, 71 Ga. 387; First Nat. Bk. of Helena *v.* Roberts, 9 Mont. 323; s. c. 23 Pac. Rep. 718; Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474; Kimball *v.* Johnson, 14 Wis. 683.

[7] Lynch *v.* Livingston, 8 Barb. 463; s. c. 6 N. Y. 422. See Harris *v.* Burton, 4 Harring. 66; Howard Mut. Loan, etc. Fund *v.* McIntyre, 3 Allen, 572;

trate for one county may act in taking an acknowledgment in another.[1] An acknowledgment before a *de facto* officer is valid.[2]

§ 2195. **The Mode in which the Acknowledgment is to be made** is governed by the law of the State where the land lies.[3]

§ 2196. **Certificate of Acknowledgment.** — In executing this duty, moreover, the certificate of the acknowledgment should show affirmatively, that the requirements of the statute in respect to the same had been *substantially* complied with.[4] Thus, in Illinois, omitting to state that the person acknowledging the deed was known to the magistrate who made it was held a fatal defect.[5] The certificate that A acknowledged the deed, when A was the *grantee*, and B the grantor, was a fatal error. But where it was that "A, the signer," acknowledged, or "T. G., the signer," where the grantor's name was T. G. S. it was held that the court, by such a reference, might construe and correct the certificate.[6] The certificate of the officer taking the acknowledgment is not conclusive as to the facts stated in it, but it may be impeached by evidence.[7] But in Maryland such evidence was excluded; and in Texas the certificate is conclusive, unless impeached for fraud or imposition.[8] In respect to the effect given to a register's certificate, the court of New Brunswick hold it conclusive, unless the fact is shown affirmatively that the person signing was not such register.[9]

§ 2197. **Certificate of Acknowledgment, continued.** — The certificate which an officer taking the acknowledgment of a deed is required to make upon the deed, if it is in proper form, is

Jackson d. Wyckoff *v.* Humphrey, 1 Johns. 498; Jackson d. Walsh *v.* Colden, 4 Cow. 280; Thurman *v.* Cameron, 24 Wend. 91, 92.

[1] Learned *v.* Riley, 14 Allen, 109; Stat. 1863, c. 157; Odiorne *v.* Mason, 9 N. H. 30.

[2] Hamilton *v.* Pitcher, 53 Mo. 334; Bullene *v.* Garrison, 1 Wash. T. 587; Crutchfield *v.* Hewett, 2 App. D. C. 373; Sharp *v.* Thompson, 100 Ill. 447.

[3] Jones *v.* Berkshire, 15 Iowa, 248.

[4] Jacoway *v.* Gault, 20 Ark. 190; Bryan *v.* Ramirez, 8 Cal. 461; Belcher *v.* Weaver, 46 Tex. 293.

[5] Tully *v.* Davis, 30 Ill. 108.

[6] Wood *v.* Cochrane, 39 Vt. 544; Chandler *v.* Spear, 22 Vt. 388.

[7] Dodge *v.* Hollinshead, 6 Minn. 46; Jackson d. Hardenbergh *v.* Schoonmaker, 4 Johns. 161; Edgerton *v.* Jones, 10 Minn. 429.

[8] Bissett *v.* Bissett, 1 Har. & M'H. 211; Hartley *v.* Frosh, 6 Tex. 208; Peterson *v.* Lowry, 48 Tex. 412.

[9] Robinson *v.* Chassey, 1 Hannay (N. B.), 50.

received as evidence of its own genuineness, without its first being shown affirmatively by whom the certificate is made.[1] Where it failed to state the county of which the certifying justice was a magistrate, it was held it might be shown *aliunde*.[2] And to uphold such certificates, courts will resort to the instrument itself; as where the certificate mentioned the county, but not the State, reference was had to the deed which recited that the county mentioned was in such a State.[3] But still the act of taking and certifying an acknowledgment of a deed is a ministerial and not a judicial one; and he may, moreover, be required to testify as to facts bearing upon the capacity of the maker of the deed to execute it.[4] If he omit to insert the requisite facts in his certificate, so as to make the record valid, he may render himself liable in damages for such neglect.[5] But a certificate that a married woman acknowledged that she freely, etc., *executed* a deed, was held to be equivalent to saying that she signed, sealed, and delivered it, and implies every necessary act to make it valid.[6] But it is competent to contradict the effect of what the certificate states; as where the deed was executed and acknowledged before the proper officer, it was held that it was competent for a party contesting the deed to show with what intent the grantor acknowledged it, in order to establish that the deed was only inchoate, and never fully executed and delivered.[7]

§ 2198. **Certificate — Married Woman's Deed.** — It has been held in Minnesota, Pennsylvania, Iowa, and California, that the certificate of acknowledgment of a married woman, made by a magistrate upon a deed, may be controlled or contradicted by evidence.[8] It may be impeached for fraud, duress, or undue

[1] Thurman *v.* Cameron, 24 Wend. 87, 92; Merrick *v.* Wallace, 19 Ill. 486; Tracy *v.* Jenks, 15 Pick. 468; Thompson *v.* Morgan, 6 Minn. 295; People *v.* Snyder, 41 N. Y. 402; Keichline *v.* Keichline, 54 Penn. St. 76; Dolph *v.* Barney, 5 Or. 191; 23 Am. L. Reg. o. s. 748.

[2] Graham *v.* Anderson, 42 Ill. 514.

[3] Carpenter *v.* Dexter, 8 Wall. 528; Brooks *v.* Chaplin, 3 Vt. 281. See also Luffborough *v.* Parker, 12 Serg. & R. 48.

[4] Truman *v.* Lore, 14 Ohio St. 151; *ante*, § 2194.

[5] Fogarty *v.* Finlay, 10 Cal. 239.

[6] Smith *v.* Williams, 38 Miss. 56; Graham *v.* Anderson, 42 Ill. 514.

[7] Hutchison *v.* Rust, 2 Gratt. 394.

[8] Dodge *v.* Hollinshead, 6 Minn. 25. See also Jackson d. Hardenbergh *v.*

influence exercised by the husband over the wife.[1] But, in Indiana, such certificate is conclusive evidence;[2] and it might be generally said, that, in the absence of fraud and duress, it is conclusive of every material fact appearing on its face. But it would not be so as to facts which the magistrate is not required to certify; and though it is not conclusive between the parties, it is as to subsequent purchasers for a valuable consideration without notice.[3]

§ 2199. **Certificates favorably regarded.** — [While it is always true that a certificate must show affirmatively a substantial compliance with every requirement of the law, and a performance of whatever is necessary to the execution, so that a certificate restricted to the acknowledgment of *signing* alone would be bad;[4] nevertheless, it is the policy of the courts to uphold acknowledgments in order to give validity to the recording. To do this, they will disregard obvious clerical errors,[5] even in the spelling of the grantor's name,[6] although a complete misnomer will be bad;[7] and they will refer to the language of the conveyance itself to support an acknowledgment;[8] and presume, until the contrary be made to appear, that the officer had authority and complied with the law.[9]]

§ 2200. **Effect of Recording — Constructive Notice.** — The pur-

Schoonmaker, 4 Johns. 161; Jackson d. Tracy *v.* Hayner, 12 Johns. 472; Annan *v.* Folsom, 6 Minn. 500; Landers *v.* Bolton, 26 Cal. 406; Hall *v.* Patterson, 51 Penn. St. 289; Borland *v.* Walrath, 33 Iowa, 130.

[1] Eyster *v.* Hatheway, 50 Ill. 522.

[2] M'Neely *v.* Rucker, 6 Blackf. 391. So it is in Illinois and Oregon, unless impeached on the ground of fraud alleged and proved. Graham *v.* Anderson, 42 Ill. 514; Dolph *v.* Barney, 5 Or. 191; 23 Am. L. Reg. o. s. 751.

[3] Williams *v.* Baker, 71 Penn. St. 482.

[4] Edwards *v.* Thom, 25 Fla. 222; s. c. 5 So. Rep. 707.

[5] Homer *v.* Schonfeld, 84 Ala. 313; s. c. 4 So. Rep. 105; Quimby *v.* Boyd, 8 Col. 194; s. c. 6 Pac. Rep. 462; Durfee *v.* Grinnell, 69 Ill. 371; Scharfenburg *v.* Bishop, 35 Iowa, 60; Durst *v.* Daugherty, 81 Tex. 650; s. c. 17 S. W. Rep. 388.

[6] Rhodes *v.* St. Anthony & D. E. Co., 49 Minn. 370; s. c. 52 N. W. Rep. 27. But see McKinzie *v.* Stafford, 8 Tex. Civ. App. 121; s. c. 27 S. W. Rep. 790.

[7] Carleton *v.* Lombardi, 81 Tex. 355; s. c. 16 S. W. Rep. 1081.

[8] Carpenter *v.* Dexter, 8 Wall. 513; Owen *v.* Baker, 101 Mo. 407; s. c. 14 S. W. Rep. 175; Paxton *v.* Ross, 89 Iowa, 661; s. c. 57 N. W. Rep. 428; Dahlem Estate, 175 Penn. St. 454; s. c. 34 Atl. Rep. 807.

[9] Summer *v.* Mitchell, 29 Fla. 179; s. c. 10 So. Rep. 562; s. c. 30 Am. St. Rep. 106; s. c. 14 L. R. A. 815; Hoadley *v.* Stephens, 4 Neb. 431.

poses of this record are chiefly to give notice to all persons having occasion to ascertain whether there has been any prior conveyance or incumbrance of any real estate; and when it is made, it becomes constructively a notice, and as effectual in law as if given personally to the party to be affected by it. It may, therefore, be stated in general and nearly unqualified terms, that between the parties to the deed, or the heirs or devisees of the grantor and the grantee and those claiming under him, the validity of the deed is not affected by the want of record; and that the same is true as to all purchasers who may take a subsequent deed, knowing of the existence of a prior one. The authorities upon this point are numerous; and the language of the court of Pennsylvania, in one case, is as follows: "The deed was upon record, and, being there, was constructive notice to all the world." All the authorities agree that there is no difference in legal effect between actual and constructive notice.[1] But where there is no record, the purchaser should have actual notice of the previous deed, or of some fact which would satisfy a prudent man that there had been a transfer of the land.[2] But to prevail against such prior purchaser, even where the second has no notice of the first conveyance, he must have purchased upon payment of a good and valuable consideration.[3] But the registration of a deed is notice to those only who claim title through or under the grantor in the recorded deed.[4] Nor is it notice to a grantee, in a deed already on record, of acts done by his grantor after the first deed was recorded.[5] But notice to an agent or trustee is notice to the principal.[6] If a vendee make a mortgage to his vendor, who puts it on record, it is no notice of the vendee's deed from the vendor, which is not

[1] Hill *v.* Epley, 31 Penn. St. 335. See Godbold *v.* Lambert, 8 Rich. Eq. 155; Belk *v.* Massey, 11 Rich. 614; Morrison *v.* Kelly, 22 Ill. 610; 4 Dane, Abr. 85; Jamaica Pond Aq. Corp. *v.* Chandler, 9 Allen, 169; Ellison *v.* Wilson, 36 Vt. 67; Wilkins *v.* May, 3 Head, 176; Speer *v.* Evans, 47 Penn. St. 144; Dixon *v.* Lacoste, 1 Sm. & M. 107; Patterson *v.* De la Ronde, 8 Wall. 300; Robinett *v.* Compton, 2 La. Ann. 854.

[2] Mills *v.* Smith, 8 Wall. 33; Maupin *v.* Emmons, 47 Mo. 306.

[3] Barney *v.* McCarty, 15 Iowa, 514; Maupin *v.* Emmons, *supra;* Shotwell *v.* Harrison, 22 Mich. 410.

[4] Ely *v.* Wilcox, 20 Wis. 530; Losey *v.* Simpson, 11 N. J. Eq. 246, 249.

[5] George *v.* Wood, 9 Allen, 80.

[6] Myers *v.* Ross, 3 Head, 59.

recorded, as against a second purchaser from such vendor. Nor is a purchaser bound to take notice of the record of a deed made by a vendee of the same vendor, if such vendee's deed is not itself on record, so as to complete the chain of his title.[1] If a purchaser know that his vendor has made a prior deed of the estate to another, it will not aid him in getting his own deed on record first that he did not know the kind of conveyance which his grantor had made.[2]

§ 2201. **Possession as Notice.** — The courts in many of the States hold, that open, notorious, exclusive, unequivocal, and visible possession by the grantee in a deed is to be deemed such notice of its having been made;[3] while in other States a different rule prevails, holding, at least, that such possession is not to be deemed conclusive evidence of notice.[4] And no inference is to be deduced from possession, when it is consistent with the possessory title on record.[5] Open and notorious possession may be sufficient to put a purchaser on inquiry as to the existence of a deed, and he may meet this by showing that he made diligent but ineffectual inquiry.[6] One ground on which possession obviated the necessity of notice by record, as put in an early case in Massachusetts, was, that a man out of possession of land could not convey it; but that, of course, can apply only where the original owner is as much out of

[1] Losey *v.* Simpson, 11 N. J. Eq. 246.

[2] Galland *v.* Jackman, 26 Cal. 87.

[3] Watkins *v.* Edwards, 23 Tex. 443; Laroe *v.* Gaunt, 62 Tex. 481; Partridge *v.* McKinney, 10 Cal. 181; Stafford *v.* Lick, 7 Cal. 479; Hunter *v.* Watson, 12 Cal. 363; Day *v.* Atl. & Gt. West. R. R. Co., 41 Ohio St. 392; Morrison *v.* Kelly, 22 Ill. 610; Canfield *v.* Hard (Vt.), 3 Eastern Rep. 461; Helms *v.* May, 29 Ga. 121; Wyatt *v.* Elam, 23 Ga. 201; Berg *v.* Shipley, 1 Grant, Cas. 429; Rowe *v.* Ream, 105 Penn. St. 543; Coleman *v.* Barklew, 27 N. J. L. 357; Hodge *v.* Amerman (N. J.), 2 Eastern Rep. 537; Lea *v.* Polk Co. Copper Co., 21 How. 493; Maupin *v.* Emmons, 47 Mo. 307; Watrous *v.* Blair, 32 Iowa, 63; Harper *v.* Perry, 28 Iowa, 62; Russell *v.* Sweezey, 22 Mich. 239.

[4] Moore *v.* Jourdan, 14 La. Ann. 414; Nutting *v.* Herbert, 37 N. H. 346; Pomroy *v.* Stevens, 11 Met. 244; Mara *v.* Pierce, 9 Gray, 306; Dooley *v.* Wolcott, 4 Allen, 406. In Pennsylvania, the court say, possession, in order to be notice, must be clear and unequivocal possession. Billington *v.* Welsh, 5 Binn. 129.

[5] Colby *v.* Kenniston, 4 N. H. 262; Emmons *v.* Murray, 16 N. H. 398; Fair *v.* Stevenot, 29 Cal. 490; Ely *v.* Wilcox, 20 Wis. 531; Patten *v.* Moore, 32 N. H. 384; Truesdale *v.* Ford, 37 Ill. 210.

[6] Fair *v.* Stevenot, 29 Cal. 490; Lestrade *v.* Barth, 19 Cal. 676; Janvrin *v.* Janvrin, 60 N. H. 169.

possession as if he were actually disseised.[1] In Ohio, a purchaser is charged with notice of the equitable title of the one in possession of the estate he purchases, whatever that may be.[2] But where a vendor sold a part of his estate, and retained a part, and both he and his vendee occupied the premises, it was held not to be a notice of the purchase. To have that effect, it must be exclusive, open, and notorious, such as enclosure, cultivation, erection of buildings,[3] and the like.

§ 2202. **Record does not pass Title.** — The recording of the deed has nothing to do with the actual passing of the title: it is but notice of that act having been already done.[4]

§ 2203. **Date of Filing, Date of Record.** — It is provided by statute — to which the reader is referred — in most States, that the date of the record of a deed has reference to the time of its being lodged or deposited with the proper recording officer at the office of registration.[5]

§ 2204. **Record is Notice to whom.** — A deed duly recorded is constructive notice of its existence and its contents to all persons claiming what is thereby conveyed under the same grantor by subsequent purchase or mortgage, but not to other persons.[6]

[1] Anonymous, Quincy, 370.

[2] McKinzie *v.* Perrill, 15 Ohio St. 168.

[3] Billington *v.* Welsh, 5 Binn. 132; Smith *v.* Yule, 31 Cal. 184; Truesdale *v.* Ford, 37 Ill. 210. See, upon possession being notice, Crassen *v.* Swoveland, 22 Ind. 434; Daniels *v.* Davison, 16 Ves. 249; Woodward *v.* Clark, 15 Mich. 112; Stewart *v.* McSweeney, 14 Wis. 468; Boggs *v.* Anderson, 50 Me. 161. And for what would amount to implied notice, see Curtis *v.* Mundy, 3 Met. 405.

[4] King *v.* Gilson, 32 Ill. 354; Stevens *v.* Morse, 47 N. H. 533; Earle *v.* Fiske, 103 Mass. 492.

[5] Walk. Am. Law, 358; Warnock *v.* Wightman, 1 Brev. 331; Den d. Read *v.* Richman, 13 N. J. L. 52; Mallory *v.* Stodder, 6 Ala. 801; Dubose *v.* Young, 10 Ala. 365; Nichols *v.* Reynolds, 1 R. I. 30; Harrold *v.* Simonds, 9 Mo. 326; Davis *v.* Ownsby, 14 Mo. 175; Gill *v.* Fauntleroy, 8 B. Mon. 177; McRaven *v.* McGuire, 9 Sm. & M. 34, 48; Horsley *v.* Garth, 2 Gratt. 471; Quirk *v.* Thomas, 6 Mich. 76; McCabe *v.* Grey, 20 Cal. 509; Anonymous, Quincy, 375; Kessler *v.* State, 24 Ind. 315; Bigelow *v.* Topliff, 25 Vt. 274, 285; Hine *v.* Robbins, 8 Conn. 347.

[6] Bates *v.* Norcross, 14 Pick. 224, 231; Tilton *v.* Hunter, 24 Me. 35; Little *v.* Megquier, 2 Me. 176; Crockett *v.* Maguire, 10 Mo. 34. See Flynt *v.* Arnold, 2 Met. 619, for a practical application of this principle as to the remoteness of this grantor; Whittington *v.* Wright, 9 Ga. 23; Shults *v.* Moore, 1 McLean, C. C. 520; Doe d. Godfrey *v.* Beardsley, 2 McLean, C. C. 412; Walk. Am. Law, 358; 4 Kent, Com. 174, note; 4 Greenl. Cruise, 452. note; Story, Eq. Jur. § 403; Shaw *v.* Poor, 6 Pick. 86, 88.

Thus where one of several co-tenants conveyed the entire estate by deed, which was recorded, it was held not to be a constructive notice to his co-tenants of such deed, inasmuch as they did not claim under him.[1]

§ 2205. **Deed must be entitled to Record.** — But the record of a deed is not constructive notice of its existence or contents, unless all the prerequisites prescribed by law to be observed in respect to its registration, such as its acknowledgment and the like, have been complied with. Nor would it be constructive notice if the deed were on record in any way not authorized by law; and the same would be true of any instrument not required by law to be recorded.[2] It is also true that the registry of a defective deed is no notice of title to any one. If defective in the formal requisites of its execution or proof, it is not entitled to registration at all.[3] So a record of a deed in a wrong county has no effect as a notice.[4]

§ 2206. **Notice limited to what Record shows.** — The record of a deed itself limits by its terms the extent to which it constitutes constructive notice to others. Thus, where the condition of a mortgage-deed, as written, was to pay $3,000, but the record showed the condition to be the payment of $300, it was held to be a constructive notice of an incumbrance of $300 only.[5]

§ 2207. **Time Limit for recording.** — In some of the States, there is a time prescribed by statute within which a deed,

[1] Holley *v.* Hawley, 39 Vt. 532.

[2] Shults *v.* Moore, 1 McLean, C. C. 520; Isham *v.* Bennington Iron Co., 19 Vt. 230; Choteau *v.* Jones, 11 Ill. 300; Herndon *v.* Kimball, 7 Ga. 432; Tillman *v.* Cowand, 12 Sm. & M. 262; Blood *v.* Blood, 23 Pick. 80; De Witt *v.* Moulton, 17 Me. 418; Carter *v.* Champion, 8 Conn. 549; Story, Eq. Jur. § 404; Heister *v.* Fortner, 2 Binn. 40; Shaw *v.* Poor, 6 Pick. 88; Cheney *v.* Watkins, 1 Harr. & J. 527; Doe d. Strong *v.* Smith, 3 McLean, C. C. 362; Lewis *v.* Baird, id. 56; Kerns *v.* Swope, 2 Watts, 75; Graves *v.* Graves, 6 Gray, 391; Burnham *v.* Chandler, 15 Tex. 441; Bossard *v.* White, 9 Rich. Eq. 483; Galpin *v.* Abbott, 6 Mich. 17; McKean, etc. Land Imp. Co. *v.* Mitchell, 35 Penn. St. 269; Dussaume *v.* Burnett, 5 Iowa, 95; Peck *v.* Mallams, 10 N. Y. 518; Harper *v.* Barsh, 10 Rich. Eq. 149; Ely *v.* Wilcox, 20 Wis. 529; Stevens *v.* Hampton, 46 Mo. 408.

[3] Isham *v.* Bennington Iron Co., 19 Vt. 245; Harper *v.* Barsh, *supra*; Meighen *v.* Strong, 6 Minn. 177, a deed not properly witnessed.

[4] Harper *v.* Tapley, 35 Miss. 510; Stewart *v.* McSweeney, 14 Wis. 468.

[5] Beekman *v.* Frost, 18 Johns. 544; Frost *v.* Beekman, 1 Johns. Ch. 299. See Chamberlain *v.* Bell, 7 Cal. 292; Terrell *v.* Andrew County, 44 Mo. 309.

when recorded, takes effect by relation back from its delivery, and gives it precedence over intermediate conveyances, even as to persons ignorant of such unrecorded deed. In Georgia, the time is twelve months; and if two successive deeds are made of the same land, and neither is recorded within the prescribed time, the recording of the second deed after that time, but prior to the first, does not give it precedence over the first.[1] But when recorded, though after the expiration of twelve months, it is a notice from the time of its record, but does not relate back to any prior time.[2] The same rule applies as to the effect of a record made in South Carolina, if made within forty days;[3] while in Pennsylvania, where the time is six months, in a case like the last, if the second deed were taken without actual notice of the first, and were recorded first, it would give it precedence of the one first executed.[4] And the same rule applies in Ohio.[5] The time in New Jersey, as stated in the case cited, is six months; though the deed may be recorded after that, but not so as to affect a subsequent *bona fide* deed lodged for record before the first is itself lodged: whereas, if the prior deed is lodged for record before the second, though after the expiration of the six months, it will take precedence of the second.[6] The time is now limited, however, to fifteen days by statute.[7] In Illinois, if two deeds are executed on the same day, the one which is first recorded takes priority.[8] In Massachusetts, in determining the question of precedence between a purchaser or mortgagee and a creditor, no time is allowed for the former in which to record his deed.[9]

[1] Thornt. Conv. 157; Doe d. Hammond *v.* Reddin, Dudl. (Ga.) 177; Martin *v.* Williams, 27 Ga. 406.

[2] Helms *v.* O'Bannon, 26 Ga. 132; Anderson *v.* Dugas, 29 Ga. 440; McRaven *v.* McGuire, 9 Sm. & M. 34; Mallory *v.* Stodder, 6 Ala. 804.

[3] Leger *v.* Doyle, 11 Rich. 109; Belk *v.* Massey, id. 614.

[4] Lightner *v.* Mooney, 10 Watts, 407. Mortgages to be recorded in sixty days. 4 Greenl. Cruise, Dig. 445; Poth *v.* Anstatt, 4 Watts & S. 307; Berg *v.* Shipley, 1 Grant, Cas. 429; Souder *v.* Morrow, 33 Penn. St. 83.

[5] Northrup *v.* Brehmer, 8 Ohio, 492.

[6] Den d. Read *v.* Richman, 13 N. J. L. 43. Now fifteen days only are allowed for recording a deed of conveyance, but none for mortgages. Nixon, Dig. 1861, 132, § 18, 550, § 10.

[7] Rev. 1877, Conveyances, 14; Stat. 1880, c. 171, § 2.

[8] Stebbins *v.* Duncan, 108 U. S. 32.

[9] Cushing *v.* Hurd, 4 Pick. 253, 256.

In Connecticut, the grantee has a reasonable time in which to record the deed, in order to take precedence of an attachment by a creditor of the grantor.[1] (For the statutes in the various States, see *post*, note at the end of chapter c.)

§ 2208. **Acknowledgment sometimes necessary to Validity.** — In some States, a deed is required to be acknowledged, and the acknowledgment certified thereon, in order to its operating to pass a title. This is the case in Ohio and, it seems, Maryland; and where the certificate left the name of the grantor blank, it was held that it was not competent to supply the defect by parol evidence.[2] In other States a deed may convey a title as against the grantor and his heirs, though not acknowledged so as to be admitted to record.[3] [And, generally, it will be found that the execution of a deed by a married woman, to be valid, must be acknowledged in the manner provided by statute.[4]]

§ 2209. **When Execution of Deed need not be proved.** — In some of the States, if a deed is properly admitted to record, it may be used in evidence without any further proof in the first place, as the courts will presume that all the circumstances necessary to give validity to the instrument have been complied with. States in which this is true are New York, New Jersey, Pennsylvania, Virginia, North Carolina, Georgia, Alabama, Illinois [provided it had been duly acknowledged[5]], Mississippi, California, Kansas, Texas, Delaware, Wisconsin, Kentucky, and Missouri.[6] But in other States the deed must be proved, as at common law, in order to be used by the holder in evidence in questions involving the validity of the deed. Where deeds are more than thirty years old, they come under the class of *ancient*

[1] Goodsell *v.* Sullivan, 40 Conn. 83.

[2] Smith *v.* Hunt, 13 Ohio, 260, 268; Md. Pub. Gen. Stat. 1888, Art. 21, § 15.

[3] Blain *v.* Stewart, 2 Iowa, 383; Gibbs *v.* Swift, 12 Cush. 393; Ricks *v.* Reed, 19 Cal. 571. See also Doe d. Wayman *v.* Naylor, 2 Blackf. 32; Stevens *v.* Hampton, 46 Mo. 408; Lake *v.* Gray, 30 Iowa, 415; s. c. 35 Iowa, 459.

[4] See *ante*, § 2101.

[5] Carpenter *v.* Dexter, 8 Wall. 532.

[6] 2 Greenl. Ev. § 299, note; Hutchison *v.* Rust, 2 Gratt. 394; Young *v.* Ringo, 1 T. B. Mon. 30; Toulmin *v.* Austin, 5 Stew. & P. 410; Bell *v.* McCawley, 29 Ga. 355; Clark *v.* Troy, 20 Cal. 219; Houghton *v.* Jones, 1 Wall. 702; Doe d. Short *v.* Prettyman, 1 Houst. (Del.) 339; Simpson *v.* Mundee, 3 Kan. 181; Younge *v.* Guilbeau, 3 Wall. 640; Hinchliff *v.* Hinman, 18 Wis. 135; Landers *v.* Bolton, 26 Cal. 405; Samuels *v.* Borrowscale, 104 Mass. 207.

instruments, and may be admitted as evidence without calling the attesting witnesses; but if executed under a power, by an agent or attorney, the power must be shown.[1] In Maryland, the enrolment of a deed of bargain and sale is evidence of a title, without producing the original, in the trial of an ejectment.[2] And the same is true in Maine.[3] In several of the States, where it becomes necessary to make out a party's title through deeds between other persons than the immediate parties to his own deed, courts admit in evidence the original records or certified copies of recorded deeds, without requiring any further authentication thereof by witnesses;[4] and, if used in making out a chain of titles, such copy will be accepted as evidence that the person signing it as president of a company was such in fact.[5]

§ 2210. **Who is a Bona Fide Purchaser under Recording Acts.** — The proposition may be regarded as applicable to all the States, that actual notice has the same effect in determining the right of precedence between persons claiming under different deeds from the same grantor as a record thereof regularly made would itself have. The question of priority of rights, arising from a priority of record of two or more deeds, arises, properly, between those from the grantor.[6] And in order that one whose deed is prior in record, but subsequent in date, to another, should claim precedence of right thereby, he must show that he is a purchaser for a consideration actually paid: the recital of such payment in the deed is not enough.[7] If two deeds of the same land have been made and recorded, and one only has been delivered, the latter takes precedence in point of time over the other.[8] In Pennsylvania, the record of a deed is

[1] 1 Greenl. Ev. § 21; Fell *v.* Young, 63 Ill. 106.

[2] Hurn *v.* Soper, 6 Harr. & J. 276, 280.

[3] Hatch *v.* Bates, 54 Me. 138.

[4] Dixon *v.* Doe d. Lasselle, 5 Blackf. 106; Scanlan *v.* Wright, 13 Pick. 523; Ward *v.* Fuller, 15 Pick. 185; Eaton *v.* Campbell, 7 Pick. 10; Farrar *v.* Fessenden, 39 N. H. 268; Harvey *v.* Mitchell, 31 N. H. 582; Cogan *v.* Frisby, 36 Miss. 178; Samuels *v.* Borrowscale, 104 Mass. 207.

[5] Chamberlain *v.* Bradley, 101 Mass. 190.

[6] Long *v.* Dollarhide, 24 Cal. 227.

[7] Watkins *v.* Edwards, 23 Tex. 447; Boone *v.* Chiles, 10 Pet. 211; Parker *v.* Foy, 43 Miss. 260; Shotwell *v.* Harrison, 22 Mich. 410; Bishop *v.* Schneider, 46 Mo. 472; Maupin *v.* Emmons, 47 Mo. 304.

[8] Parmelee *v.* Simpson, 5 Wall. 81.

not notice to a stranger, unless it is also indexed;[1] and the same is true in Missouri, and, to a qualified extent, in Iowa.[2] If the grantee in a second deed which is recorded knew of a prior unrecorded deed when he took it, the latter will take precedence of the former, though the real purchaser, and the one who paid the consideration, and had the deed made to such grantee, did not know of the prior deed.[3] If one when he purchases knows that his grantor has no title, he cannot set up his deed against the real owner, although he did not know who he was when he took his deed.[4] And to give one a precedence as a *bona fide* purchaser, he must not only not have notice of a prior title when he purchases, but when he pays the consideration also. If he pays after such knowledge had, he cannot claim the rights of a *bona fide* purchaser.[5] Between the parties, and against the heirs or devisees of the grantor, an unrecorded deed is as effectual to pass a title as one duly registered. Where there are several grantees, notice to one of them, when he takes the deed, is notice to all.[6]

§ 2211. **Judgment Creditors not protected.** — [A judgment creditor, however, in the absence of statute, inasmuch as he pays no new consideration for his lien, is not entitled to be considered a *bona fide* purchaser, and failure to record a prior

[1] Speer *v.* Evans, 47 Penn. St. 144.

[2] Bishop *v.* Schneider, 46 Mo. 472; Barney *v.* McCarty, 15 Iowa, 522; Whalley *v.* Small, 25 Iowa, 188.

[3] Murphy *v.* Nathans, 46 Penn. St. 512.

[4] Fitzhugh *v.* Barnard, 12 Mich. 110.

[5] Blanchard *v.* Tyler, 12 Mich. 339; Ohio Life Ins., etc. Co. *v.* Ledyard, 8 Ala. 866; Wells *v.* Morrow, 38 Ala. 125; McConnel *v.* Reed, 5 Ill. 117; Doe d. McConnel *v.* Reed, 3 Ill. 371; Givan *v.* Doe d. Tout, 7 Blackf. 210; Doe d. Godfrey *v.* Beardsley, 2 McLean, C. C. 421; Hopping *v.* Burnam, 2 Greene, 39, 48; Applegate *v.* Gracy, 9 Dana, 224; Boling *v.* Ewing, id. 76; Nason *v.* Grant, 21 Me. 160; Trull *v.* Bigelow, 16 Mass. 406, 418; Flynt *v.* Arnold, 2 Met. 622; Dixon *v.* Doe d. Lacoste, 1 Sm. & M. 70; Rogers *v.* Jones, 8 N. H. 264; Wark *v.* Willard, 13 N. H. 389; Den d. Read *v.* Richman, 13 N. J. L. 43; Schutt *v.* Large, 6 Barb. 373; Jackson d. Hopkins *v.* Leek, 19 Wend. 339; Irvin *v.* Smith, 17 Ohio, 226; Martin *v.* Quattlebam, 3 McCord, 205; Lillard *v.* Rucker, 9 Yerg. 64, 73; Corliss *v.* Corliss, 8 Vt. 373; Turner *v.* Stip, 1 Wash. 319; Sicard *v.* Davis, 6 Pet. 124; Van Rensselaer *v.* Clark, 17 Wend. 25; Swan *v.* Moore, 14 La. Ann. 833; Morrison *v.* Kelly, 22 Ill. 610; Burkhalter *v.* Ector, 25 Ga. 55; Miller *v.* Chittenden, 2 Iowa, 315; Blain *v.* Stewart, id. 378; Ricks *v.* Reed, 19 Cal. 571.

[6] Stanley *v.* Green, 12 Cal. 148.

deed will not give precedence to the lien of the judgment.[1]] But in Kentucky, Tennessee, and Virginia, to give a purchaser preference over a creditor who knew of his prior deed, it is necessary that his deed be recorded.[2] And in the District of Columbia, North Carolina, South Carolina, Delaware, Florida, Mississippi, Nebraska, Tennessee, Texas, and Virginia, unrecorded deeds are declared void against creditors.[3]

§ 2212. **Innocent Purchaser from Prior Grantor's Heir.** — A question has been raised, whether, if an ancestor has conveyed his estate to one who has not recorded the deed, and, after the ancestor has died, his heir has conveyed the same estate to an innocent purchaser who has had his deed recorded, he can hold it against the grantee of the ancestor. Some of our courts, carrying out the idea that a purchaser may be governed by what he finds on the record, and, if he finds no deed there recorded from the ancestor, has a right to presume that his title descended to his heir, hold that the purchaser from the heir, whose deed is recorded, will hold in preference to the grantee of the ancestor whose deed is not recorded.[4] Other courts hold such second deeds valid as against the ancestor's unrecorded deed, on the additional ground that an unrecorded deed is a mere nullity against all persons but the grantor therein, his heirs and devisees, and persons having notice of the deed.[5] Other of our courts, holding the deed of the ancestor effectual to divest him of the title, maintain that he had no estate at his decease which could descend to his heir, and therefore a deed from the heir could not take effect to defeat the title of the grantee of the ancestor.[6]

§ 2213. **Innocent Purchaser — Quitclaim Deed.** — Some courts hold that a purchaser under a quitclaim deed is not entitled to

[1] Davis *v.* Ownsby, 14 Mo. 170; Wilcoxson *v.* Miller, 49 Cal. 193; Apperson *v.* Burgett, 33 Ark. 328.

[2] Lillard *v.* Rucker, 9 Yerg. 64; Edwards *v.* Brinker, 9 Dana, 69; Ring *v.* Gray, 6 B. Mon. 368; Gerrant *v.* Anderson, 4 Rand. 208.

[3] See statutes *post*, note at the end of chapter c.

[4] Youngblood *v.* Vastine, 46 Mo. 239; Kennedy *v.* Northup, 15 Ill. 148; M'Culloch *v.* Eudaly, 3 Yerg. 346.

[5] Earle *v.* Fiske, 103 Mass. 491; Powers *v.* M'Ferran, 2 Serg. & R. 47.

[6] Hill *v.* Meeker, 24 Conn. 211; Hancock *v.* Beverly, 6 B. Mon. 532; Harlan *v.* Seaton, 18 B. Mon. 312.

be considered a *bona fide* purchaser.[1] But, in general, a quit-claim deed which is recorded takes precedence of an unrecorded prior deed of which the former had no notice.[2]

§ 2214. **Bona Fide Purchaser from Mala Fide Grantee.** — As a deduction from these principles, if one purchases of another who holds a recorded deed, he will acquire thereby a precedence over one holding a prior unrecorded deed of which he was not cognizant, although the holder of such recorded deed knew of the existence of such prior deed when he took his own, and could not himself have claimed any precedence. But if the holder of the earlier deed have it recorded before the holder of a deed of a later date, but an earlier record, who took it with knowledge of the prior deed, shall have actually conveyed the estate to another, though he is ignorant of such earlier deed, the record would be constructive notice to such purchaser from the holder of the later deed, and defeat his precedency of title.[3]

§ 2215. **Of what Facts Record is Notice.** — In regard to the extent to which a purchaser is bound by constructive notice, and what a purchaser by a subsequent deed is presumed to know, the rule is, that the law imputes to such purchaser a knowledge of all facts relating to the same land appearing at the time of his purchase upon the muniments of title which it was necessary for him to inspect in order to ascertain the sufficiency of such title.[4] Thus, if one takes a deed which refers to another of the same estate, in which are contained

[1] Marshall *v.* Roberts, 18 Minn. 405; Fries *v.* Griffin, 35 Fla. 212; s. c. 17 So. Rep. 66.

[2] Pettingill *v.* Devin, 35 Iowa, 354, which cites Doe d. McConnel *v.* Reed, 5 Ill. 117; Rowe *v.* Beckett, 30 Ind. 154. So Brown *v.* Banner Oil Co., 97 Ill. 214; Woodward *v.* Sartwell, 129 Mass. 210; Fox *v.* Hall, 74 Mo. 315. So also Kennedy *v.* Northup, 15 Ill. 154; Morgan *v.* Clayton, 61 Ill. 40, unless words of express restriction are found in the quitclaim.

[3] Trull *v.* Bigelow, 16 Mass. 406, 418; Flynt *v.* Arnold, 2 Met. 619, 627. See Coffin *v.* Ray, 1 Met. 212; Adams *v.* Cuddy, 13 Pick. 460; Hagthorp *v.* Hook, 1 Gill & J. 270; Boynton *v.* Rees, 8 Pick. 329; Bayles *v.* Young, 51 Ill. 127; Brackett *v.* Ridlon, 54 Me. 434.

[4] Blackw. Tax. Tit. 84, 85; Baltimore, etc. *v.* White, 2 Gill, 444, 457; Laussat, Fonbl. Eq. 518, note; Jackson d. Livingston *v.* Neely, 10 Johns. 374; Brush *v.* Ware, 15 Pet. 93, 113; Story, Eq. Jur. § 403; Daughaday *v.* Paine, 6 Minn. 452, 453; 2 Spence, Eq. 757; Fitzhugh *v.* Barnard, 12 Mich. 110; Mason *v.* Payne, Walker, Ch. 459; Jumel *v.* Jumel, 7 Paige, 591; Harris *v.* Fly, id. 421; Moore *v.* Bennett, 2 Cas. in Ch. 246; Reeder *v.* Barr, 4 Ohio, 446; Burch *v.* Carter, 44 Ala. 115.

restrictive covenants as to the mode of using the estate, and this deed has been recorded, it is notice to the purchaser of such restrictive clause.[1] So if, in a recorded deed, reference is made to another deed, also on record, in which it is stated that the trees growing upon the land have been sold, it has been held to be a notice of such sale, although the deed by which they were conveyed is not itself upon record.[2] What would be constructive notice in such cases may be said to be a knowledge by the purchaser of some facts which would put him upon inquiry, and require him to examine other matters that would generally unfold the true title.[3] All deeds referred to on which the title is based must be examined as to any facts which they may contain at the purchaser's peril. A recital in a deed, forming a link in the chain of title, of any facts which shall put a subsequent grantee or mortgagee upon inquiry, and cause him to examine other matters by which a defect in the title would be disclosed, is constructive notice of such defect.[4] And if an ordinarily diligent search would bring to the inquirer a knowledge of a prior incumbrance or alienation, he is presumed to know of them.[5] Thus, where, in the deed of a purchaser under whom a party claimed land through sundry mesne conveyances, a restriction as to building thereon was imposed ; but, though mentioned and referred to in several of the intermediate deeds, it was not mentioned in that of the present owner, nor in several of the next preceding mesne conveyances ; and the question was, if the present owner was chargeable with notice ; the court held, that though he was not shown to have had actual notice, "yet, as the conveyances under which he holds refer to deeds in which it (the restriction) is contained, and these deeds are recorded, he must be taken to have had notice of the existence of such restriction in the original deeds, and of its consequences."[6]

[1] Gibert *v.* Peteler, 38 N. Y. 165. [2] White *v.* Foster, 102 Mass. 375.

[3] Meier *v.* Blume, 80 Mo. 179.

[4] Hamilton *v.* Nutt, 34 Conn. 501 ; Acer *v.* Westcott, 46 N. Y. 384 ; Baker *v.* Matcher, 25 Mich. 53 ; Cambridge Valley Bank *v.* Delano, 48 N. Y. 326. Thus, where one took an assignment of a mortgage, without reading it, he was held bound by the word "trustee" in the mortgage, which would have given him notice of a trust attaching to the property. Smith *v.* Burgess, 133 Mass. 511.

[5] Flynt *v.* Arnold, 2 Met. 619, 625 ; 4 Greenl. Cruise, Dig. 452, note.

[6] Gibert *v.* Peteler, 38 Barb. 488, 512.

CHAPTER C.

TITLE BY PRIVATE GRANT — DEEDS VOID AND VOIDABLE.

§ 2216. Of the deed of a disseisee.
2217. Doctrine not applied to incorporeal hereditaments.
2218. Deed of one constructively disseised.
2219. States maintaining this doctrine.
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2228. Conveyances in fraud of marital rights.
NOTE. Statutory provisions respecting deeds.

§ 2216. **Of the Deed of a Disseisee.** — From an early date, the policy of the law has not admitted of the conveyance, by any one, of a title to land which is in the adverse seisin and possession of another. This is considered, not as passing a title, but as the transfer of a right of action in violation of the early laws against champerty and maintenance, and, therefore, not to be sustained by the courts. The statute upon this subject is 32 Hen. VIII. c. 9. In Georgia, a conveyance of land by one against whom the land conveyed is held adversely by claim of title is void.[1] And in Massachusetts this is true, though the grantor may have been out of possession only four months.[2] By the deed of one disseised being void is intended only that it is inoperative to convey legal title and seisin, or a right of entry upon which the grantee may maintain an action in his own name against one who has actual seisin. It is not void as a contract between the parties to it.[3] But the possession of a

[1] Jones *v.* Munroe, 32 Ga. 188.

[2] Sohier *v.* Coffin, 101 Mass. 179.

[3] Farnum *v.* Peterson, 111 Mass. 151; McMahon *v.* Bowe, 114 Mass. 144.

tenant at will is no objection to a valid grant by the lessor of the estate held by him.[1] Nor that of another tenant in common, though claiming to own the whole under a separate deed.[2] And if the grantor out of possession enter upon the land, and deliver the deed thereon, it purges the seisin, and passes a good title.[3] But by such a deed the grantor does not lose his right of seisin, and an action will lie in the name of the grantor to recover the land. The title to the land is unaffected by the transaction.[4] The doctrine is extended to mortgages. If the mortgagee is disseised, he cannot assign his mortgage.[5]

§ 2217. **Doctrine not applied to Incorporeal Hereditaments.** — But the principle does not seem to apply, except in relation to that of which seisin may be predicated; as, where one wrongfully diverted a stream from its channel through the land which the owner conveyed to a third person, it was held, that, by such conveyance, a right to the flow of the water passed, the doctrine of being out of seisin not applying to such natural easements as watercourses.[6] And the same is true of rights of way.[7]

§ 2218. **Deed of one constructively disseised.** — The effect of a disseisin by construction upon the disseisee's right to convey, by reason of the disseisor being in under color of title, seems to be this: If he enters under a deed which he believes to be a valid one to convey title, he will be so far in possession of all the land described in his deed, that the owner would be disseised, and could not convey till he regained his seisin by entry; but if the deed under which he holds is void, and he knows it, the owner would be no further disseised than the actual possession and occupation extends of him who enters under such a deed.[8]

[1] Alexander *v.* Carew, 13 Allen, 72.

[2] Patterson *v.* Nixon, 79 Ind. 251; Elliott *v.* Frakes, 90 Ind. 389.

[3] Farwell *v.* Rogers, 99 Mass. 36; Warner *v.* Bull, 13 Met. 1.

[4] Brinley *v.* Whiting, 5 Pick. 348, 355; Barry *v.* Adams, 3 Allen, 493; Loud *v.* Darling, 7 Allen, 206; Kincaid *v.* Meadows, 3 Head, 192; Shortall *v.* Hinckley, 31 Ill. 219; Sohier *v.* Coffin, 101 Mass. 179; McMahon *v.* Bowe, 114 Mass. 145.

[5] Dadmun *v.* Lamson, 9 Allen, 88.

[6] Corning *v.* Troy Iron, etc. Factory, 40 N. Y. 191.

[7] Randall *v.* Chase, 133 Mass. 210.

Livingston *v.* Peru Iron Co., 9 Wend. 511, 522, 523; Moore *v.* Worley, 24 Ind. 83.

§ 2219. **States maintaining this Doctrine.** — This principle that one cannot convey land in the adverse possession of another has been adopted as the law of several States, although a different rule prevails in many of them. Among the States where this principle of law has been held to prevail are New York,[1] North Carolina, Kentucky, New Hampshire, Massachusetts, Alabama, Rhode Island, Connecticut, Florida, and Tennessee.[2]

§ 2220. **Such Deed valid between the Parties.** — But the principle applies only as to the one holding adversely at the time the deed is made, and those claiming under him. As to all the rest of the world, the deed would be valid and effectual.[3] And the deed is void only as regards enforcing the title against the disseisor. If the grantee gets possession, his possession is good against all, and gives him an indefeasible title.[4] Merely being out of possession on the part of the grantor does not avoid a deed, when it arises from a mistaken arrangement in respect to the dividing-line between him and the adjacent owner, where each supposes he is rightfully occupying his own land, without intending to interfere with the rights of the

[1] In New York, by statute, this requires "an actual possession under a title adverse to the grantor." Accordingly, a specific title is required. Crary *v.* Goodman, 22 N. Y. 170 ; Laverty *v.* Moore, 33 N. Y. 658. And see Requa *v.* Holmes, 26 N. Y. 338 ; Thallhimer *v.* Binckerhoff, 3 Cow. 623.

[2] Co. Lit. 214 *a* ; Lalor, Real Prop. 253 ; Den d. Gibson *v.* Shearer, 1 Murph. 114 ; Hoyle *v.* Logan, 4 Dev. 495 ; Thurman *v.* Cameron, 24 Wend. 87 ; Ewing *v.* Savary, 4 Bibb, 424 ; Hathorne *v.* Haines, 1 Me. 238 ; Dame *v.* Wingate, 12 N. H. 291 ; Parker *v.* Proprs. Locks, etc., 3 Met. 98 ; Bernstein *v.* Humes, 60 Ala. 582 ; Galbreath *v.* Doe d. Zook, 8 Blackf. 366 ; Wade *v.* Lindsay, 6 Met. 407, 414 ; Burdick *v.* Burdick, 14 R. I. 574 ; Conn. Gen. Stat. 1888, § 2966 ; Nelson *v.* Brush, 22 Fla. 374 ; Code of Tenn. §§ 3171–3174. As to the character of adverse possession which renders a deed void, see Foxcroft *v.* Barnes, 29 Me. 128. That it need not be under color of title, see Bernstein *v.* Humes, 60 Ala. 582 ; that it must be more than a trespasser's possession, see Ft. Wayne R. R. *v.* Mellett, 92 Ind. 535. In Wisconsin, in order to have such a deed void, the adverse claimant must be in actual possession, or in under color of title by deed clearly covering the land in question. Granger *v.* Swart, 1 Woolw. C. C. 91.

[3] Livingston *v.* Peru Iron Co., 9 Wend. 511, 523 ; Livingston *v.* Proseus, 2 Hill (N. Y.), 526 ; Edwards *v.* Roys, 18 Vt. 473 ; Wade *v.* Lindsey, 6 Met. 407, 414 ; Stockton *v.* Williams, 1 Doug. (Mich.) 546 ; Betsey *v.* Torrance, 34 Miss. 138 ; Univ. of Vt. *v.* Joslyn, 21 Vt. 61 ; Farnum *v.* Peterson, 111 Mass. 151 ; McMahon *v.* Bowe, 114 Mass. 145.

[4] Snow *v.* Orleans, 126 Mass. 453.

other.[1] And this further effect would follow from such conveyance, that though no title is thereby created in the grantee as against the tenant holding adverse possession, and the original title remains in the grantor, still he holds it as trustee for the use of his grantee, so far that his grantee may sue for possession of the land in the grantor's name; and the possession, when thus gained, enures to the benefit of the grantee.[2]

§ 2221. **There are Exceptions to the Rule** as to the effect of adverse possession upon the validity of a deed, among which is the case of the State granting lands. As the State cannot be disseised, no adverse possession can effect its right to convey its lands.[3] Nor does such possession affect the validity of a sale under a judicial decree, or by a public officer acting in that capacity.[4] The possession of a tenant holding over is not so adverse to his lessor as to render his deed of the estate invalid.[5]

§ 2222. **States which deny the Doctrine.** — Among the States where a conveyance of lands, though in the adverse possession of another, will pass the grantor's title as a valid deed, are Pennsylvania, Maine, Vermont, Michigan, Illinois, Indiana, South Carolina, Wisconsin, Ohio, Iowa, Minnesota, Kansas, Missouri, Arkansas, California, Georgia, and Mississippi.[6]

§ 2223. **Deeds void or voidable — Sunday — Duress — Fraud.** — In Ohio, a deed is valid, though made on Sunday.[7] It would be void in Indiana if delivered on that day; but it may be good though made on that day, if delivered upon another

[1] Sparhawk *v.* Bagg, 16 Gray, 585; Cleaveland *v.* Flagg, 4 Cush. 76.

[2] Wade *v.* Lindsey, 6 Met. 413, 414; McMahon *v.* Bowe, 114 Mass. 145; Betsey *v.* Torrance, 34 Miss. 138, 139; Livingston *v.* Peru Iron Co., 9 Wend. 523; Stockton *v.* Williams, 1 Doug. (Mich.) 567; Jackson d. Walton *v.* Leggett, 7 Wend. 380; Wilson *v.* Nance, 11 Humph. 191; Edwards *v.* Parkhurst, 21 Vt. 472; Hamilton *v.* Wright, 37 N. Y. 502.

[3] People *v.* New York, 28 Barb. 240; Ward *v.* Bartholomew, 6 Pick. 409.

[4] Hanna *v.* Renfro, 32 Miss. 130; Frizzle *v.* Veach, 1 Dana, 211, 216; Jarrett *v.* Tomlinson, 3 Watts & S. 114.

[5] Taylor *v.* Kelly, 3 Jones, Eq. 240.

[6] Cresson *v.* Miller, 2 Watts, 272; Hall *v.* Ashby, 9 Ohio, 96; Bennet *v.* Williams, 5 Ohio, 461; Shortall *v.* Hinckley, 31 Ill. 219; Fetrow *v.* Merriwether, 53 Ill. 279; Fort Wayne R. R. Co. *v.* Mellett, 92 Ind. 535; Crane *v.* Reeder, 21 Mich. 82; Stewart *v.* McSweeney, 14 Wis. 471; Poyas *v.* Wilkins, 12 Rich. 420. And see statutes, at the end of this chapter.

[7] Swisher *v.* Williams, Wright (Ohio), 754. See Tracy *v.* Jenks, 15 Pick. 465.

day.[1] If one receive a deed on Sunday, and give back a declaration of trust at the same time, he cannot hold the estate independent of such trust.[2] A deed given by the way of composition of a felony cannot be avoided for that reason by the grantor; but a deed obtained by duress of imprisonment may be avoided, by the grantor or his heirs, by a re-entry upon the premises.[3] No influence short of fraud or duress, exerted upon the grantor, will avoid a deed, unless it amount to destroying his free agency.[4] But a deed may be avoided at common law for fraud, in part or in full, depending upon circumstances. Thus, where a grantor is made by fraud to include three parcels of estate in a deed, when he had sold only one, he may recover back the parcels thus fraudulently conveyed without affecting the deed as to the other parcels.[5] But in all cases, the rights of a *bona fide* purchaser for a valuable consideration from a fraudulent grantee are preserved.[6] And the same doctrine applies to *bona fide* purchasers from married women who have, by undue influence on the part of their husbands, been induced to part with their property.[7]

§ 2224. **Conveyances in Fraud of Creditors.** — There is a class of conveyances of lands, which, though formal in all respects, and effectual between the parties, are, by the policy of the law or by statute, held to be void to a certain extent. This embraces what are known as fraudulent conveyances, where the intent of the parties to the same is to defraud the creditors or the subsequent purchasers of the grantor by means of such conveyance. The questions arising under these are usually referred to the statutes of 13 Eliz. c. 5, and 27 Eliz. c. 4; though these are said to be in affirmance of the common law, and, in one form or the other, prevail over all the United States. The first of these statutes relates to creditors, and provides, in general terms, that all conveyances of lands

[1] Love *v.* Wells, 25 Ind. 506.

[2] Faxon *v.* Folvey, 110 Mass. 396.

[3] Worcester *v.* Eaton, 11 Mass. 368; s. c. 13 Mass. 371.

[4] Howe *v.* Howe, 99 Mass. 99.

[5] Bartlett *v.* Drake, 100 Mass. 177.

[6] Somes *v.* Brewer, 2 Pick. 184; Worcester *v.* Eaton, 11 Mass. 379; Deputy *v.* Stapleford, 19 Cal. 302.

[7] White *v.* Graves, 107 Mass. 325.

intended to defraud or delay creditors, shall, as to such creditors, be void.[1] It was held in New Hampshire, that if one conveys his land to defraud his creditors, and this is known to a subsequent purchaser from the same grantor, he can hold nothing by his deed, although made for a valuable consideration.[2] But in Massachusetts, such second purchaser would hold against the fraudulent purchaser, although cognizant of the deed when he took his own.[3] But, in order to be fraudulent as to creditors, it must be a conveyance of something which is subject to be levied upon for debt. If, therefore, a debtor, with ever so fraudulent intent in respect to his creditors, convey what the law exempts as a homestead, it could not be avoided on that account.[4] As the question in these cases depends upon the *bona fides* with which the transaction takes place, it would be transcending the purposes of this work to attempt to present in detail the cases wherein the questions considered related to what should be deemed evidence of good or bad faith. But this may be stated, that no declarations made by the grantor after the conveyance has been completed will be admitted to impeach the deed for fraud.[5] A few general principles may, however, be properly stated.

§ 2225. **Fraudulent Conveyances — General Principles.** — Such conveyance, though fraudulent, is, if otherwise sufficient, and for a valuable consideration, valid as to all innocent purchasers not privy to the fraudulent intent. Thus if a fraudulent grantee convey the estate to a *bona fide* purchaser for a valuable consideration, the conveyance is good, and the first grant will be purged of the fraud.[6] So, though the grantor makes the conveyance with a fraudulent intent, it will not affect the

[1] Burton, Real Prop. §§ 221 228 ; Story, Eq. §§ 352–356 ; Sands *v.* Codwise, 4 Johns. 536, 559 ; 1 Am. Lead. Cas. 68 ; Penniman *v.* Cole, 8 Met. 499 ; Coolidge *v.* Melvin, 42 N. H. 525.

[2] Stevens *v.* Morse, 47 N. H. 532–537.

[3] Ricker *v.* Ham, 14 Mass. 141 ; Clapp *v.* Leatherbee, 18 Pick. 137.

[4] Wood *v.* Chambers, 20 Tex. 254 ; Dreutzer *v.* Bell, 11 Wis. 114 ; Gassett *v.* Grout, 4 Met. 490 ; Story, Eq. § 367 ; Danforth *v.* Beattie, 43 Vt. 138 ; Stanley *v.* Snyder, 43 Ark. 429.

[5] Bridge *v.* Eggleston, 14 Mass. 250 ; Steinbach *v.* Stewart, 11 Wall. 566.

[6] Oriental Bank *v.* Haskins, 3 Met. 340 ; Jackson d. Bartlett *v.* Henry, 10 Johns. 185 ; Somes *v.* Brewer, 2 Pick. 184, 198. See Clapp *v.* Tirrell, 20 Pick. 247 ; Wright *v.* Howell, 35 Iowa, 292.

validity of the transaction unless the grantee was cognizant of his intent, or participated in it.[1] And though the design be originally fraudulent as to creditors, and known to the grantee so as to be void as to creditors so long as the transactions had that character, yet it may become valid by being purged of the fraud by matter *ex post facto*, if the fraudulent intent is abandoned.[2] But if vendor and vendee participate in the purpose of the vendor to defraud or delay creditors by conveying his land, it will be void as to such creditors, though a full and valuable consideration may have been paid for the same.[3] Whether the intent be to defraud present or future creditors, it will be void as to them if the grantee participate in the intent, although the grantor may have been paid the full value of the estate, or may have other property to any amount.[4]

§ 2226. **Fraudulent Conveyances — Voluntary Settlements.** — In respect to conveyances that are voluntary, that is, made without a valuable consideration, the cases are very numerous, but not uniform. And it may be remarked in passing, that the consideration of marriage, or an express promise to marry, if the marriage ultimately be prevented by the death of the grantor, is regarded in law as a valuable one, and takes the case out of the category of voluntary conveyances.[5] The editors of the American Leading Cases have collected these cases, accompanied by discriminating comments upon the classes into which they divide themselves. That such conveyances are not void as against subsequent creditors, where no intent exists to defraud such creditors, seem to be admitted law.[6] And, if not fraudulent at the time, no subsequent creditors

[1] Bridge *v.* Eggleston, 14 Mass. 250; Harrison *v.* Phillips Academy Trs., 12 Mass. 462; Carpenter *v.* Muren, 42 Barb. 300; Hughes *v.* Monty, 24 Iowa, 499.

[2] Oriental Bank *v.* Haskins, 3 Met. 340; Verplank *v.* Sterry, 12 Johns. 552; Sterry *v.* Arden, 1 Johns. Ch. 261; Smyth *v.* Carlisle, 17 N. H. 418.

[3] Story, Eq. § 369; Wright *v.* Brandis, 1 Ind. 336; Ruffing *v.* Tilton, 12 Ind. 260; Chapel *v.* Clapp, 29 Iowa, 194.

[4] Wadsworth *v.* Williams, 100 Mass. 131.

[5] Smith *v.* Allen, 5 Allen, 458; Sterry *v.* Arden, 1 Johns. Ch. 261; Huston *v.* Cantril, 11 Leigh, 176; Prodgers *v.* Langham, 1 Sid. 133; Otis *v.* Spencer, 102 Ill. 622; Prewitt *v.* Wilson, 103 U. S. 22; Nat. Exch. Bank *v.* Watson, 13 R. I. 91.

[6] Trafton *v.* Hawes, 102 Mass. 541; Beal *v.* Warren, 2 Gray, 447; Lormore *v.* Campbell, 60 Barb. 62.

can disturb the title.[1] While, as to previous creditors, different courts have applied different degrees of stringency in the rule, it may be laid down as a general proposition, that, if such conveyance be made to any person other than a child, it will be void as to existing creditors; and when made to a child, or as a settlement upon a wife, whether it shall be void or not depends upon the condition of the grantor as to his ability to pay his debts out of his remaining property at the time of its being made. And such voluntary conveyances are uniformly recognized as valid between the parties and their representatives.[2] Thus a deed by a father to his daughter at his wife's request, in consideration of her having joined with him in conveying her estate, of which he had the benefit, was held good; and, in the absence of an intent to defraud, did not come within the category of voluntary conveyances.[3] Even cases of voluntary conveyances, for consideration of blood or affection, are only presumptive evidence of fraud, if the grantor be then in debt, which may be rebutted by evidence.[4] Thus, it is laid down as a general proposition, that a voluntary conveyance for the benefit of one's wife, for the consideration of love and affection, will be void as against existing creditors, if he is insolvent.[5] In other cases, such a conveyance has been held to be fraudulent as to future as well as present creditors.[6] The same principle was applied in a case where a debtor, in failing circumstances, bought land and took a deed in his wife's name, and they together conveyed to B, who knew enough facts to create a reasonable ground for belief that the deeds were designed to enable the purchaser to defraud his creditors. It

[1] Thacher *v.* Phinney, 7 Allen, 150.

[2] Sexton *v.* Wheaton, 8 Wheat. 229; Salmon *v.* Bennett, 1 Conn. 525; 1 Am. Lead. Cas. 49–85; Doe d. Abbott *v.* Hurd, 7 Blackf. 510; Bullitt *v.* Taylor, 34 Miss. 708, 737, and cases cited in the argument; Story, Eq. §§ 362, 364, 371; Reade *v.* Livingston, 3 Johns. Ch. 500, 501; Hinde *v.* Longworth, 11 Wheat. 199. See Washband *v.* Washband, 27 Conn. 424, for the distinction between an inadequate and no consideration, in its effect where grantor owes existing debts: in the former the deed will be good, unless made with a fraudulent intent. Lerow *v.* Wilmarth, 9 Allen, 386; Mercer *v.* Mercer, 29 Iowa, 557.

[3] Brooks *v.* Dalrymple, 12 Allen, 102.

[4] Lerow *v.* Wilmarth, 9 Allen, 386; Pomeroy *v.* Bailey, 43 N. H. 118.

[5] Baldwin *v.* Tuttle, 23 Iowa, 74; Houston *v.* Blackman, 66 Ala. 559.

[6] Redfield *v.* Buck, 35 Conn. 329, 338; Case *v.* Phelps, 39 N. Y. 164; Paulk *v.* Cooke, 39 Conn. 566; Savage *v.* Murphy, 34 N. Y. 508.

was held that B could not hold the estate against the purchaser's creditors.[1] There is a pretty large class of cases, in which, whether a settlement of his land by one in debt shall be held fraudulent or not as to his creditors, depends upon the circumstances under which it is done. Thus one, having more property than enough to pay his debts, provided a house for his wife and children by a voluntary conveyance for that purpose, and it was held to be valid;[2] and nobody but his creditors could call such a transaction in question.[3] The deed is valid and effectual as against the grantor and his heirs.[4] But the proposition is subject to the limitation, that the transaction is fair, and not with a view of defrauding his creditors at the time, or with a view to future indebtedness.[5] It is good, though voluntary in favor of a son or wife, if he still has property, which, in the common course of dealing, is amply sufficient to secure his creditors.[6] Where the conveyance is made with an actual fraudulent intent, it may be avoided by subsequent as well as previous creditors.[7] The cases cited below fully sustain the foregoing proposition.[8] The law in Case *v.* Phelps is stated thus, in substance: If a man about to engage in a hazardous business convey his estate, without consideration, for the benefit of his wife and family, if the same shall prove disastrous it would be a fraud even as to future creditors, and may be avoided by them. In Pennsylvania it was held, that whether such a settlement would be fraudulent or not depended on whether the husband, in such case, did engage in such business. A mere intent to contract future debts would not be sufficient, if it was not carried out. The point turns

[1] Baker *v.* Bliss, 39 N. Y. 70, 80.

[2] Gridley *v.* Watson, 53 Ill. 193.

[3] Bridgford *v.* Riddell, 55 Ill. 261; Moritz *v.* Hoffman, 35 Ill. 553.

[4] Jackson d. Malin *v.* Garnsey, 16 Johns. 189; Upton *v.* Basset, Cro. Eliz. 445.

[5] Pratt *v.* Myers, 56 Ill. 24; Van Wyck *v.* Seward, 6 Paige, 62.

[6] Miller *v.* Pearce, 6 Watts & S. 101; Posten *v.* Posten, 4 Whart. 42; Stewart *v.* Rogers, 25 Iowa, 395; Sedgwick *v.* Place, 5 Ben. 184; 6 Am. L. Rev. 181.

[7] Parkman *v.* Welch, 19 Pick. 231. But see Bullitt *v.* Taylor, 34 Miss. 740, 741; Coolidge *v.* Melvin, 42 N. H. 521, 522; Herschfeldt *v.* George, 6 Mich. 466; Beach *v.* White, Walker, Ch. 496; Cutter *v.* Griswold, id. 437.

[8] Marston *v.* Marston, 54 Me. 476; Bridgford *v.* Riddell, 55 Ill. 264; Redfield *v.* Buck, 35 Conn. 329, 338; Case *v.* Phelps, 39 N. Y. 164; Freeman *v.* Pope, L. R. 9 Eq. 206.

upon whether his motive in making the conveyance was to withdraw the property from the reach of the debts subsequently incurred.[1] But in England, the case cited, of Freeman *v.* Pope, seems to maintain, that if, when one makes a voluntary settlement, he is indebted, and a prior creditor is delayed in the payment of his debt, it might be set aside by a subsequent creditor, however solvent the debtor might have been when he made the settlement, or however free from any fraudulent intent in making it. But in Minnesota, no one can object to a fraudulent conveyance who was not a creditor at the time it was made.[2] But that a voluntary conveyance, made in good faith, will be good against a subsequent purchaser with notice, seems to be the better rule of law as now prevailing in the United States, though held otherwise in England; and it would not be good against a subsequent purchaser without notice, if for a valuable consideration.[3]

§ 2227. **Fraudulent Conveyances — Preferences.** — Another class of conveyances which were good at common law have been declared fraudulent by statute under the doctrine of modern bankrupt and insolvent laws; and that is, conveyances intended to give undue preferences to creditors, and to prevent an equal distribution of a bankrupt's assets among his creditors.[4] In such case, the assignee of the insolvent debtor may go on and sell the estate as his, and will pass a good title without doing anything to set aside the conveyance.[5] But though a debtor be insolvent, and convey his whole estate to satisfy a single *bona fide* debt, it will be a valid conveyance at common law, though both parties knew it; nor can the other creditors disturb it, except by process in bankruptcy or insolvency.[6]

[1] Williams *v.* Davis, 69 Penn. St. 21–28.

[2] Stone *v.* Myers, 9 Minn. 311.

[3] Story, Eq. §§ 427, 428; Cathcart *v.* Robinson, 5 Pet. 264, 280; Beal *v.* Warren, 2 Gray, 447; Doe d. Newman *v.* Rusham, 17 Q. B. (A. & E.) N. S. 724; Jackson d. Stewart *v.* Town, 4 Cow. 603; Sterry *v.* Arden, 1 Johns. Ch. 261. See Upton *v.* Basset, Cro. Eliz. 445; Buckle *v.* Mitchell, 18 Ves. 100; Smith *v.* Allen, 5 Allen, 456; Trafton *v.* Hawes, 102 Mass. 541.

[4] Penniman *v.* Cole, 8 Met. 500; Nary *v.* Merrill, 8 Allen, 451; Mass. Gen. Stat. c. 118, § 91.

[5] Freeland *v.* Freeland, 102 Mass. 478.

[6] Giddings *v.* Sears, 115 Mass. 505.

§ 2228. **Conveyances in Fraud of Marital Rights.** — For a man or woman, on the eve of marriage, to convey away his or her estate (in this case it was the entire property of the husband), if done without a valuable consideration, and not disclosed to the other party before the marriage, would be so far a fraud *per se* upon the marital rights of the other party, that equity would set it aside so far as it conflicted with these rights, although the party so defrauded did not know whether the person he or she was about to marry had been possessed of the property in question or not.[1] So where a woman, on the eve of her marriage, conveyed her lands without the knowledge of her intended husband, and without consideration, it was held fraudulent as to him.[2]

NOTE.

The following are the statutory provisions of the several States and Territories relating to deeds, their execution, acknowledgment, and record : —

Alabama. — Deeds must be subscribed. A seal is not required. Acknowledgment dispenses with necessity of witnesses. The conveyance operates as a record from the day of delivery to the judge of probate. Real property must be recorded in the county in which the land is situated. The recording operates as notice of the contents, without any acknowledgment or probate thereof. Conveyances of unconditional estates and mortgages, or instruments in the nature of a mortgage, of real property, to secure any debt created at the date thereof, are void as to purchasers for a valuable consideration, mortgagees, and judgment creditors, having no notice thereof, unless recorded within thirty days from their date. A defeasance must be recorded within the same time. In all conveyances of estates in fee, the words "grant," "bargain," "sell," or either of them, must be construed, unless it appears otherwise, as an express covenant that the grantor was seised of an indefeasible estate in fee-simple. Code, 1896, c. 26.

Alaska. — See Oregon. Act of Congress, May 17, 1884.

Arizona. — No estate of inheritance or freehold or for a term of more than one year, in lands and tenements, shall be conveyed from one to another unless the conveyance be declared by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing. Such conveyance must be acknowledged and recorded to be good against subsequent *bona fide* purchasers. Every deed must be signed or acknowledged in the presence of at least two witnesses. From the use of the word "grant" or "convey," unless restricted, the following covenants are implied : 1. That previous to the time of the

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[1] Chandler *v.* Hollingsworth, 3 Del. Ch. 99.

[2] Robinson *v.* Buck, 71 Penn. St. 386.

execution of such conveyance the grantor has not conveyed the same estate or any right, title, or interest therein, to any person other than the grantee. 2. That such estate is at the time of the execution of such conveyance free from incumbrances. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance. The term "incumbrances" includes taxes, assessments, and all liens upon real property. Married woman of the age of seventeen years and upwards may convey lands vested in her own right without being joined by her husband. Rev. Stat. 1887, § 214 *et seq.*

Arkansas. — All lands, tenements, and hereditaments may be aliened and possession thereof transferred by deed without livery of seisin, and the words "grant, bargain, and sell" shall be an express covenant to the grantee, his heirs and assigns, that the grantor is seised of an indefeasible estate in fee-simple, free from incumbrance done or suffered from the grantor, except rents or services that may be expressly reserved by such deed, as also for the quiet enjoyment thereof against the grantor, his heirs and assigns, and from the claim or demand of all persons whatsoever, unless limited by express words in such deed. The term "heirs" is not necessary to create a fee-simple. A married woman may convey her real estate by deed of conveyance executed by herself the same as if she were a *feme sole*. Deeds must be executed in the presence of two witnesses, or, in default thereof, shall be acknowledged by the grantor in the presence of two such witnesses, who shall then subscribe such deed or instrument in writing, and when the witnesses do not subscribe the deed or instrument in writing aforesaid at the time of the execution thereof, the date of their subscribing the same shall be stated with their signatures. Deeds must be recorded in order to be good against subsequent *bona fide* purchasers and lienors. Constructive notice begins from the time of filing. Dig. Stat. 1894, § 696 *et seq.*

California. Anestate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing. A married woman may convey in the same manner as if she were unmarried. From the use of the word "grant" in any conveyance by which an estate of inheritance or fee-simple is to be passed, the following covenants, and none other, on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance: 1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee. 2. That such estate is at the time of the execution of such conveyance free from incumbrances done, made, or suffered by the grantor, or any person claiming under him. The term "incumbrances" includes taxes, assessments, and all liens upon real property. An unrecorded deed is good between the parties and those who have notice thereof. Unrecorded deeds are void against subsequent purchasers whose conveyances are first duly recorded. A deed is deemed to be recorded when it is filed in the clerk's office. The distinction between sealed and unsealed instruments is abolished. Civil Code, 1899, p. 274 *et seq.*

Colorado. — Persons and corporations are authorized to convey real estate by deed. Livery of seisin is unnecessary. Lands not in possession may be conveyed. Covenants of seisin, peaceable possession, freedom from incumbrances, and of warranty,

contained in any conveyance of real estate, or of any interest therein, shall be held to run with the premises, and to inure to the benefit of all subsequent purchasers and incumbrancers. Any instrument of writing to which the maker shall affix a scroll, by way of seal, shall be of the same effect and obligation to all intents as if the same were sealed, but a seal or scroll is not necessary. Deeds acknowledged properly shall be deemed *prima facie* evidence of the proper execution thereof. Constructive notice begins when the deed is filed. Private corporations authorized by law to convey any of their real estate may convey the same by deed under their common seal, subscribed by their president or other head officer. No covenant, express or implied, in the deed of any married woman shall have any effect to bind such married woman, or her heirs, save so far as to pass to the purchaser named therein all her present estate in the real estate therein described, thereby expressed to be conveyed. Mill's Annot. Stat. 1891, c. 29.

Connecticut. — All conveyances shall be in writing, sealed by the grantor, and subscribed with his own hand, or with his mark with his name annexed, or by his attorney authorized for that purpose by a power executed and acknowledged and attested by two witnesses. Conveyances of real estate made to or by any corporation may be attested by witnesses interested therein, and may be acknowledged before properly authorized persons who are so interested. Deeds of married women, executed by them jointly with their husbands, and duly acknowledged and recorded, shall be valid and effectual to transfer such estate; and all conveyances, by the husband alone, of the real estate of the wife shall be ineffectual to convey her interest therein. No conveyance shall be effectual to hold lands against any other person but the grantor, unless recorded on the records of the town in which the lands lie. Gen. Stat. 1888, c. 176.

Delaware. — Lands, tenements, and hereditaments may be aliened by deed, without livery of seisin, and the legal estate shall accompany the use and pass with it. Where there is no express covenant in a deed, the words "grant, bargain, and sell" shall, unless specially restrained, imply a special warranty against a grantor and his heirs, and all persons claiming under him. The deed of a married woman, executed by her during her coverture, to which her husband is also a party, concerning lands or tenements, shall be valid and effectual as if she were sole, if she, upon private examination, apart from her husband, shall acknowledge that she executed said deed willingly, without compulsion, or threats, or fear of her husband's displeasure. A deed executed by a corporation may be executed and acknowledged before the chancellor, or any judge of this State, or a judge of the district or circuit court of the United States, or a notary public, or two justices of the peace of the same county, by the president or other presiding officer [duly authorized by resolution of the directors, trustees, or other managers, or by the] legally constituted attorney of such corporation. The recording of a deed or instrument in the recorder's office for one county shall have effect only in respect to lands mentioned in said deed situated in said county. Deeds not recorded within three months are not good against subsequent creditors, mortgagees, and purchasers in good faith and for a valuable consideration. Laws, 1893, c. 83.

District of Columbia. — Deeds may be acknowledged before any of the following officers: Before any judge of a court of record and of law, any chancellor of a State, any judge of the supreme, circuit, district, or territorial courts of the United States, any justice of the peace, any notary public, or any com-

missioner of the circuit court of the district, appointed for that purpose. Deeds made in a foreign country may be executed and acknowledged before any judge or chancellor of any court, master, or master extraordinary in chancery, or notary public, or before any secretary of legation, or consular officer of the United States. Deeds having been acknowledged, proved, or certified, as the case may be, are deemed recorded when delivered to the recorder of deeds. If two or more deeds containing the same property, after having been acknowledged, or proved and certified, be delivered to the recorder for record on the same day, that which shall have been first sealed and delivered shall have preference in law. A married woman joining in any deed or releasing her dower must be examined separately and apart from her husband, and the officer taking her acknowledgment must explain to her the deed fully. Comp. Stat. 1894, c. 58.

Florida. — No interest in lands for a term of more than two years shall be created or transferred in any other manner than by deed in writing, signed, sealed, and delivered in the presence of at least two subscribing witnesses by the party transferring or creating such estate. Any corporation may convey lands by deed, sealed with its common seal, and signed in its name by the president or chief executive officer of the corporation. A married woman owning real property may sell, convey, or mortgage it as she might do if she were not married : Provided her husband join in such sale, conveyance, or mortgage. Any married woman having a right of dower in any real property may relinquish it by joining in the conveyance or mortgage of such real property, or by a separate deed executed in like manner as other conveyances. A married woman must acknowledge separately and apart from her husband that she executed the deed freely and voluntarily, and without compulsion, constraint, apprehension, or fear of or from her husband, and the officer's certificate shall set forth all these requirements. No conveyance shall be good against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded. The execution of deeds must be acknowledged to entitle them to record, or the execution thereof must be proved by a subscribing witness. Rev. Stat. 1892, § 1950 *et seq.*

Georgia. — A deed to lands in this State must be in writing, signed by the maker, attested by at least two witnesses, and delivered to the purchaser, or some one for him, and be made on a valuable or good consideration. No prescribed form is necessary. A deed to lands, made while the same are held adversely, is not void. In a sale of land there is no implied warranty of title. A general warranty of title, against the claims of all persons, includes in itself covenants of a right to sell, and of quiet enjoyment and of freedom from incumbrances. Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the land lies. The record may be made at any time, but such deed loses its priority over a subsequent recorded deed from the same vendor, taken without notice of the existence of the first. A wife joining in her husband's deed must declare before a proper officer that she has joined with her husband in the alienation of said lands of her own free will and consent, without any compulsion or force used by her husband to oblige her so to do. Code, 1895, § 3599 *et seq.*

Idaho. — Conveyance of real estate must be made in writing, subscribed by the party disposing of the same, or by his agent authorized in writing. From the use of the word "grant" in any conveyance by which an estate of inheritance, posses-

sory right, or fee-simple is to be passed, the following covenants, and none other, are implied: 1. That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate to any other person. 2. That such estate is at the time of the execution of such conveyance free from incumbrances. A married woman making a conveyance must acknowledge the same separate and apart from her husband. An unrecorded instrument is good between the parties. An instrument is deemed to be recorded when, being duly acknowledged, or proved and certified, it is deposited in the recorder's office. Every conveyance of real property, acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees. Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, in good faith and for a valuable consideration, whose conveyance is first duly recorded. Rev. Stat. 1887, p. 352 *et seq.*

Illinois. — Livery of seisin is not necessary in order to convey real property. Deeds and other conveyances in writing, signed and sealed by the party making the same, shall be sufficient for the conveyance of lands. Lands not in possession may be conveyed; even those held adversely may be conveyed by the one who has the legal right to possession. The words "grant," "bargain," and "sell" shall be adjudged an express covenant that the grantor was seised of an indefeasible estate in fee-simple, free from all incumbrances, also for quiet enjoyment against the grantor and his assigns. Married women, being above the age of eighteen years, joining with their husbands in the execution of any deed shall be bound and concluded by the same, in respect to their right, title, claim, or interest in such estate, as if they were sole. The acknowledgment or proof of any deed, mortgage, conveyance, release of dower, power of attorney, by a married woman, may be made and certified the same as if she were a *feme sole*, and to the same effect. Deeds are to be recorded in the county in which the real estate is situated. Record takes effect from the time of filing as to subsequent creditors and purchasers without notice; and all such deeds shall be void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record. Deeds not acknowledged shall be deemed such notice as above from the time of filing for record. Rev. Stat. 1899, c. 30.

Indiana. — Conveyances of lands, or any interest therein, shall be by deed in writing, subscribed, sealed, and duly acknowledged by the grantor or his attorney, except *bona fide* leases for a term not exceeding three years. The joint deed of the husband and wife shall be sufficient to convey and pass the lands of the wife. No conveyance of any real estate in fee-simple or for life, orof any future estate, and no lease for more than three years from the making thereof, shall be valid and effectual against any person other than the grantor, his heirs and devisees, and persons having notice thereof, unless it is made by a deed recorded within the time and in the manner provided in this act. Every conveyance not so recorded in forty-five days from the execution thereof shall be fraudulent and void as against any subsequent purchaser, lessee, or mortgagee in good faith and fora valuable consideration. To entitle any conveyance to record it must be acknowledged. It shall not be necessary for a married woman to acknowledge her deed in any form other than that required by unmarried persons. A married woman over the age of eighteen and under the age of twenty-one may convey her right in and to any lands of her husband,

sold and conveyed by him, and the father or mother of such married woman shall declare, before the officer taking the wife's acknowledgment, that he or she believes that such conveyance is for the benefit of the married woman, and that it would be prejudicial to her and her husband if such conveyance was not made. If neither father nor mother of the wife is living, she may then join in the conveyance with the consent of the circuit judge of the circuit court where the husband and wife reside. Such judge is empowered to give his consent if he thinks the conveyance is for the benefit of the wife. Rev. Stat. 1894, c. 20.

Iowa. — Adverse possession of real estate does not prevent any person from selling his interest in the same. A married woman may convey or incumber any real estate belonging to her to the same extent as any other person. No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless recorded in the county in which the real estate lies. It shall not be deemed lawfully recorded, unless it has been previously acknowledged or proved. If the acknowledgment is made by the officers of a corporation, the certificate of acknowledgment shall show that such persons, as such officers (naming the office of each person), acknowledged the execution of the instrument as the voluntary act and deed of such corporation, by each of them voluntarily executed. The acknowledgment of a married woman, when required by law, may be taken in the same form as if she were sole. Code, 1897, § 2925 *et seq.*

Kansas. — Conveyances of lands, or any other estate or interest therein, may be made by deed executed by any person having authority to convey the same, or his agent or attorney, and may be acknowledged and recorded as herein provided. Any person claiming title to real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he was in the actual possession thereof. Deeds acknowledged and proved in the manner prescribed impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice. No such instrument shall be valid, except between the parties thereto and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record. Deeds executed and acknowledged by private corporations under and pursuant to section four of chapter twenty-two of the General Statutes of 1868 are hereby ratified. Gen. Stat. 1897, c. 117.

Kentucky. — The owner may convey any interest in lands not in the adverse possession of another; but no estate of inheritance or freehold, or for a term of more than one year, in lands, shall be conveyed, unless by deed or will. A covenant by a grantor in a deed, "that he will warrant the property hereby conveyed," or words of like import, or the words, "with warranty" or "with general warranty," in any deed, shall have the same effect as if the grantor had covenanted that he, his heirs and personal representatives, would forever warrant and defend the said property unto the grantee, his heirs, personal representatives, and assigns, against the claims and demands of all persons whatever. A covenant by a grantor, "that he will warrant specially the property thereby conveyed," or words of like import, or the words "with special warranty," in any deed, shall have the same effect as if the grantor had covenanted that he would forever warrant and defend the property unto the grantee against the claim and demands of the grantor and all persons claiming under him. Deeds are to be recorded in the county where the land is situated in order to be good against subsequent *bona fide* purchasers and creditors, and they

must be acknowledged to be admitted to record. Married women may convey real estate, and such conveyance may be by the joint deed of husband and wife, or by separate instrument; but in the latter case the husband must first convey, or have theretofore conveyed. The deed of a married woman must be acknowledged by her, and the officer taking her acknowledgment must explain to her the contents and effect of the deed. Stat. 1894, c. 29.

Louisiana. — Transfers of real estate must be in writing, signed by the grantor. For the sale to be valid against third parties, it must be recorded, and such a sale is valid only from the day of recording. Deeds must be passed before a notary and acknowledged, if passed without the State. Merrick's Rev. Code, 1900, arts. 2240, 2241, 2246, 2253, 2262, 2264.

Maine. — A person owning real estate, and having a right of entry into it, whether seised of it or not, may convey it by deed, to be acknowledged and recorded as herein provided. No conveyance of an estate in fee-simple, fee-tail, or for life, or lease for more than seven years, is effectual against any person, except the grantor, his heirs, and devisees, and persons having actual notice thereof, unless the deed is recorded as herein provided. No deed can be recorded without a certificate of acknowledgment being annexed. No estate greater than a tenancy at will can be granted or assigned, unless by some writing signed by the grantor or maker, or his attorney. Rev. Stat. 1883, c. 73.

Maryland. — No estate of inheritance or freehold, or any declaration or limitation of use, or any estate above seven years, shall pass or take effect unless the deed conveying the same shall be executed, acknowledged, and recorded as herein provided; and all such deeds shall be acknowledged. Every officer taking an acknowledgment shall give a certificate, and indorse on or annex to the deed such certificate, and the certificate shall be recorded with the deed. All deeds shall contain the names of the grantor and grantee, a consideration in cases where it is necessary, and a description of the real estate sufficient to identify the same with reasonable certainty, and the interest or estate intended thereby to be conveyed; and such deeds shall be sufficient, if executed, acknowledged, and recorded as herein required. Every deed conveying real estate shall be signed and sealed by the grantor, and attested by at least one witness. Every deed shall be recorded within six months from its date, in the county or city in which the land is situated; and where it lies in more than one county, or in the city of Baltimore and a county, it shall be recorded in all the counties and the said city in which such land lies. Every deed acknowledged and recorded shall take effect from date. No deed shall be valid for the purpose of passing title unless acknowledged and recorded as herein directed. Gen. Laws, c. 21.

Massachusetts. — A deed, executed and delivered by the person or by the attorney of the person having authority therefor, shall be sufficient, without any other act or ceremony, to convey real estate. A conveyance of a fee, fee-tail, or a life estate, or a lease for more than seven years from the making thereof, shall not be valid as against any person other than the grantor and persons having actual notice of it, unless it is recorded in the registry of deeds for the county or district in which the real estate to which it relates is situated. Deeds cannot be recorded without certificate of acknowledgment or proof of execution. Pub. Stat. 1882, p. 731 *et seq.*

Michigan. — Conveyances of lands, or of any estate or interest therein, may be made by deed, signed and sealed by the person from whom the estate is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved and recorded as directed herein, without any other act or ceremony whatever. No covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not. Lands held adversely may be conveyed by the rightful owner. Deeds executed within this State shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such, and the persons executing such deeds may acknowledge the execution thereof before any judge or commissioner of a court of record, or before any notary public, justice of the peace, or master in chancery, within the State, and the officer taking such acknowledgment shall indorse thereon a certificate of the acknowledgment thereof, and the true date of making the same, under his hand. The acknowledgment of a married woman may be taken as if she were a *feme sole*. Unrecorded conveyances shall be void as against subsequent purchasers in good faith, and for a valuable consideration, whose conveyance is first duly recorded. Howell's Annot. Stat. c. 216.

Minnesota. — Conveyances of lands may be made by deed, executed and acknowledged and recorded in the registry of deeds for the county where the land is situated. A wife's real estate may be conveyed by a joint deed of the husband and wife. Every corporation authorized to hold real estate may convey the same by an agent appointed by vote for that purpose. Lands adversely held may be conveyed by the rightful owner. No implied covenants shall be construed from any conveyance. A scroll or device used for a seal may be used in place of a seal. Deeds must be executed in the presence of two witnesses, who shall subscribe their names, and must be acknowledged by the person executing the deed. A deed must be acknowledged to entitle it to record. Stat. c. 55.

Mississippi. — Lands may be conveyed by deed signed and delivered. An estate of inheritance or freehold, or for a term of more than one year, in lands shall not be conveyed from one to another unless the conveyance be declared by writing signed and delivered. All bodies politic or corporate may convey lands by and under the corporate seal and the signature of an officer; and such officer signing the same may acknowledge the execution of the deed, or proof thereof may be made as in other cases. The words "grant, bargain, and sell" shall operate as an express covenant to the grantee, his heirs and assigns, that the grantor was seised of an estate, free from incumbrance made or suffered by the grantor, except the rents and services that may be reserved, and also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in the conveyance; and the grantee, his heirs, executors, administrators and assigns, may, in any action, assign breaches as if the covenants above mentioned were expressly inserted. Deeds are not good against a purchaser for a valuable consideration without notice, or any creditor, unless they are acknowledged, or proved by one or more of the subscribing witnesses that the grantor signed and delivered the same as his voluntary act. Deeds take effect as notice when delivered to the clerk for record. The word "warrant," without restricted words, shall constitute a covenant by the grantor that he will forever warrant and defend the title of the property unto the grantee, against the claims of all persons whomsoever lawfully claiming the same. The words "warrant specially" warrant against all persons claiming under the grantor. Where there is no warranty, the deed shall operate as a quitclaim and release. Annot. Code, c. 70.

Missouri. — Conveyances of lands, or of any estate or interest therein, may be made by deed executed by any person having authority to convey the same, or by his agent or attorney, and acknowledged and recorded as herein directed. A husband and wife may convey the real estate of the wife, and the wife may relinquish her dower, by their joint deed acknowledged and certified, but no covenant shall bind the wife except so far as may be necessary to convey from her all right, title, and interest expressed to be conveyed therein. Any private corporation authorized to hold real estate may convey the same by deed, sealed with the common seal of the corporation, and signed by the president or presiding member, or trustee thereof; and such deed, when acknowledged or proved, as other deeds of real estate are by law required to be acknowledged and proved, shall be recorded in the proper office, and have like effect as other deeds. A person may convey notwithstanding his land is held adversely. Deeds must be subscribed, and shall be acknowledged and certified. The words "grant, bargain, and sell" shall be construed to covenant that the grantor was at the time of the execution of the conveyance seised of an indefeasible estate in fee-simple, that such real estate was free from incumbrances done or suffered by the grantor, or by any person under whom he claims, and for further assurances of such real estate to be made by the grantor, and these implied covenants may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance. Deeds shall be recorded in the county where the land is situated. From the time of filing a deed for record notice begins. Unrecorded deeds are valid between the parties. Rev. Stat. c. 11.

Montana. — An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing. Any instrument affecting the title to or possession of real property may be recorded. Every conveyance of real estate must be acknowledged or proved, and if executed by a corporation, it must be acknowledged by its president or secretary, or proved by a subscribing witness, and the acknowledgment or proof must be certified. Every conveyance of real property, acknowledged or proved, and certified and recorded as prescribed by law, from the time it is filed with the county clerk for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees. Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or incumbrancer, including an assignee of a mortgage, lease, or other conditional estate of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded. An unrecorded instrument is valid between the parties. Code, 1895, § 1500 *et seq.*

Nebraska. — Deeds of real estate or any interest therein, except leases for one year or for a less time, if executed in this State, must be signed by the grantor in the presence of at least one competent witness, who shall subscribe his or her name as a witness, and be acknowledged or proved and recorded. The grantor must acknowledge the instrument to be his voluntary act and deed. Every deed is considered recorded from the time of delivery to the register of deeds. Unrecorded deeds are void against subsequent purchasers in good faith and for a valuable consideration whose deeds are first recorded. Record must be made in the county where the land is situated. Married woman has the same power as unmarried. Comp. Stat. 1899, c. 73.

Nevada. — Conveyances are made by deed, signed by the grantor, and acknowledged or proved, and recorded. A husband and wife may, by their joint deed, convey the real estate of the wife in like manner as she might do by her separate deed if she were unmarried. Notice begins from the filing of the deed for record. Unrecorded deeds are void against subsequent purchasers, in good faith and for a valuable consideration. Land held in adverse possession may be conveyed by the rightful owner. Gen. Stat. 1885, c. 18.

New Hampshire. — Real estate may be conveyed by deed executed by any person or by his attorney, acknowledged and recorded as directed. Any public or private corporation authorized to hold real estate may convey the same by an agent appointed by vote for that purpose. Deeds must be signed and sealed by the party executing the same, attested by two or more witnesses, acknowledged by the grantor before a justice, notary public, or commissioner, or before a minister or consul of the United States in a foreign country, and shall be recorded in the county where the land is situated. No deed of bargain and sale, mortgage, nor any conveyance of real estate, nor any lease for more than seven years from the making thereof, shall be valid except between the parties, unless such deed is attested, acknowledged, and recorded. Pub. Stat. 1901, c. 137.

New Jersey. — Deeds in this State must be acknowledged or proved to entitle them to record. Unless recorded they are void against subsequent purchasers, judgment creditors, and mortgagees not having actual notice. Deeds must be under seal, but a scroll has the same force as a wax seal. Gen. Stat. p. 850 *et seq.*

New York. — A conveyance of real estate must be subscribed, and sealed and acknowledged or witnessed, to be of effect against a purchaser or incumbrancer. No estate greater than one year can be conveyed unless in writing, subscribed by the party or agent authorized in writing. A conveyance takes effect only from delivery, and must be recorded with the county clerk or register, and if not so recorded it is void against subsequent purchasers in good faith first recording their conveyance. Rev. Stat. (9th ed.) p. 1812, § 137 ; pp. 1884, 1885, §§ 6–10 ; p. 1812, § 138 ; pp. 1830–1842, §§ 1–43.

New Mexico. — All conveyances of real estate shall be subscribed by the person executing the same, and must be acknowledged and certified. A married woman does not have to acknowledge separately from her husband. Record must be made in the county where the land is situated. Notice begins from the time of recording, and that is when the instrument is deposited in the record office. A scroll may be used the same as a seal. Comp. Laws, 1897, pp. 975–982.

North Dakota. — An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same or by his agent. Any foreign or domestic corporation may in its by-laws empower any one or more of its officers severally or conjointly to execute and acknowledge in its behalf conveyances. In the absence of any by-laws, the president or secretary of any corporation, and the president, secretary, treasurer, or cashier of any loan, trust, or banking corporation, may execute and acknowledge such instruments when authorized by resolution of the board of directors. A seal is not necessary. Record must be made in the county where the land is situated. An instrument is

deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the record office. Rev. Code, 1895, c. 35.

Ohio. — A deed shall be signed by the grantor, and such signing shall be acknowledged in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation, and such signing shall also be acknowledged by the grantor before a judge of a court of record in this State, or a clerk thereof, a county auditor, county surveyor, notary public, mayor, or justice of the peace, who shall certify the acknowledgment on the same sheet on which the instrument is written and subscribe his name thereto. Unrecorded deeds are void against subsequent *bona fide* purchasers. Rev. Stat. 1891, p. 1178 *et seq.*

Oklahoma. — Real estate is conveyed by deed, and must be recorded. Private corporations, authorized by law to convey their real estate, may convey the same by deed under their common seal subscribed and acknowledged by their president or other head officer. All instruments conveying real estate affecting the title of realty occupied as a homestead shall be void, unless the husband and wife join in the execution and acknowledgment. Deeds must be subscribed, but no seal is necessary. The execution of a grant of real estate, if it is not duly acknowledged, must, to entitle the grant to be recorded, be proved by a subscribing witness, or as otherwise provided. From the use of the word "grant" in any conveyance by which an estate of inheritance of fee-simple is to be passed, the following covenants, and none other, on the part of the grantor are implied: 1. That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate to any other person. 2. That such estate is at the time of the execution of such conveyance free from incumbrances done, made, or suffered by the grantor, or any person claiming under him. Such covenants may be sued on in the same manner as if they had been expressly inserted in the instrument. Record must be made in the county where the land is situated. An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the record office for record. A conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner. An unrecorded instrument is valid between the parties. Stat. 1893, cc. 21 and 82.

Oregon. — Conveyances of lands may be made by deed, signed and sealed, by the person from whom the estate is intended to pass, and acknowledged or proved, and recorded. A husband and wife may, by their joint deed, convey the real estate of the wife, in like manner as she might do by her separate deed if she were unmarried. No covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not. Land held adversely may be conveyed. Deeds shall be executed in the presence of two witnesses, who shall subscribe their names. Acknowledgment of a married woman must be taken separately and apart from her husband. Every deed must be recorded within five days, and unless this is done it shall be void against subsequent purchasers in good faith and for a valuable consideration, whose conveyance is first duly recorded. Hill's Annot. Laws, c. 21.

Pennsylvania. — Deeds may be recorded, but before the same shall be recorded the parties concerned shall procure the grantor, or else two or more witnesses (who were present at the execution), to come before one of the justices of the peace of the proper county where the land is situated. A wife's lands may be conveyed by the

joint deed of husband and wife, but the wife must make a separate acknowledgment apart from her husband. An acknowledgment of a wife is valid notwithstanding her minority. Deeds not recorded within ninety days after execution shall be deemed void against subsequent creditors in good faith and for a valuable consideration. Pepper & Lewis' Dig. col. 1530 *et seq.*

Rhode Island. — Every conveyance of lands for a term longer than one year shall be void, unless made in writing, signed and acknowledged, delivered and recorded, in the records of land-evidence in the town or city where the said land is situated ; but the conveyance is good between the parties and all persons with notice even if not recorded. A seal is not necessary. Such record or filing shall be constructive notice to all persons of the contents of such instruments and other the matters so recorded, so far as the same are genuine. The words "give," "grant," or "exchange," in any conveyance, shall imply no covenant, warranty, or right of re-entry. General Laws, 1896, c. 202.

South Carolina. — Deeds must be executed in the presence of, and be subscribed by, two or more credible witnesses. Record must be made within forty days from the time of execution in order to be good against subsequent *bona fide* purchasers. If recorded subsequent to the expiration of the forty days, they will be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice only from the date of such record. Deed must be proved by affidavit, in writing, of a subscribing witness before it will be admitted to record. Gen. Stat. 1882, c. 57. Certified copies of registered deeds admitted in evidence where the originals are lost, destroyed, or cannot be produced. Rev. Stat. 1893, § 2361.

South Dakota. — An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing subscribed by the party disposing of the same, or by his agent thereunto authorized by writing. The execution of a deed, if it is not acknowledged, must, to entitle it to be recorded, be proved by a subscribing witness, or as otherwise provided. Seals are abolished. The word "grant" implies the following warranties : 1. That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate to any other person. 2. That such estate is at the time of the execution of the conveyance free from incumbrances. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance. Annot. Stat. 1899, § 4433 *et seq.*

Tennessee. — No deed shall be good as to strangers, unless the same be acknowledged by the vendor, or proved by two witnesses upon oath, and registered in the county where the land is situated. Deeds are good between the parties if not registered. Any of said instruments not so proved, or acknowledged and registered, shall be null and void as to existing or subsequent creditors of, or *bona fide* purchasers from, the makers without notice. Code, 1896, § 3671 *et seq.*

Texas. — Conveyances must be in writing, signed and delivered. Deeds are not good against a purchaser in good faith, without notice and for a valuable consideration, nor against any creditor, unless acknowledged or proved, and filed for record in the county where the land is situated. Every deed must be signed or acknowledged by the grantor in the presence of at least two credible subscribing witnesses, or must be duly acknowledged before some authorized officer. The words "grant"

and "convey" imply the following covenants: 1. That prior to the execution of the deed the grantor has not conveyed the estate to any other person. 2. That at the time of the conveyance the estate is free from incumbrances. A deed failing as a conveyance shall be valid as a contract to convey. Batts' Civ. Stat. 1897, tit. 20.

Utah. — Conveyances must be in writing, other than leases for a term not exceeding one year, and subscribed by the party executing the same. Deeds must be proved or acknowledged, and certified and recorded, in the county where the land is situated, but shall be valid and binding between the parties without such proof, acknowledgment, certification, or record, and to all other persons who have actual notice. Seals are abolished. Deeds must be acknowledged to be recorded. Rev. Stat. 1898, § 1968 *et seq.*

Vermont. — Deeds must be acknowledged and recorded. A husband and wife may, by their joint deed, convey the real estate of the wife, as she might do by her separate deed if unmarried. A public or private corporation, authorized to hold real estate, may convey the same by an agent appointed by vote for that purpose. Deeds must be signed and sealed, and signed by two or more witnesses, and acknowledged by the grantor. Shall be recorded in the county where the land is situated. Unrecorded deeds are void against third parties, but good between the grantor and grantee. Stat. 1894, c. 106.

Virginia. — All real estate shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as livery. Unrecorded deeds are void as to subsequent purchasers for valuable consideration without notice, and creditors, until and except from the time that they are duly admitted to record in the county or corporation wherein the property is situated, subject to the qualification that any such writing which is admitted to record within twenty days from the day of its being acknowledged before and certified by a justice, notary, or other authorized person, be as valid, as to creditors and subsequent purchasers, as if such admission to record had been on the day of such acknowledgment and certificate. Code, 1887, p. 590 *et seq.*

Washington. — Deeds must be signed by the party bound, and acknowledged before some authorized person. The use of a seal is not necessary. All deeds shall be recorded in the office of the county auditor where the land is situated, and shall be valid as against *bona fide* purchasers from the date of their filing for record, and when so filed shall be notice to all the world. A married woman may convey her real estate in like manner as if she were a *feme sole*, and husband and wife may convey to each other. Ballinger's Annot. Code, p. 1188 *et seq.*

West Virginia. — Deeds must be signed and acknowledged unless proved by two witnesses, and must be executed under a scroll or seal. Code, cc. 72, 73.

Wisconsin. — Deeds shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such. When deeds are executed by corporations, they shall be signed by the president or other authorized officers of the corporation, sealed with the corporate seal, and countersigned by the secretary or clerk thereof. A scroll may be used for a seal, except where an official or corporate seal is provided for. Lands held adversely may be conveyed. No covenants are implied. Deeds must be signed and sealed by the vendor and acknowledged or proved. There must be a certificate of acknowledgment to entitle the deed to

record. Unrecorded deeds are void as to subsequent purchasers. Sanborn & Berryman, Annot. Stat. v. 1, tit. 21, p. 1284 *et seq.*

Wyoming. — Conveyances of land may be made by deed, signed and sealed by the vendor, and acknowledged or proved and recorded. A married woman may, by deed or mortgage, convey her real estate in like manner as if she were a *feme sole*. Deeds must be executed in the presence of one witness, who shall subscribe the same as such, and the vendor shall acknowledge the execution of the deed. The use of private seals, except by corporations, is abolished. Record must be made in the county where the land is situated. Unrecorded deeds are void against subsequent purchasers in good faith and for a valuable consideration. Rev. Stat. 1899, p. 737 *et seq.*

CHAPTER CI.

FORMS OF CONVEYANCE — DEEDS AT COMMON LAW.

§ 2229. Deeds of feoffment.
2230. "Gift" a feoffment.
2231. Effect of a conveyance by feoffment.
2232. Early forms of deeds of feoffment.
2233. Conveyance by grant.
2234. Effect of grant and feoffment on title of others.
2235. Grant not limited to incorporeal hereditaments.

§ 2229. **Deeds of Feoffment.** — The form of conveyance employed for ages in England until the statute of uses, and which continued to be one of the modes of conveyance there until a comparatively recent period, was that of feoffment. It did not require any deed until the time of Charles II., and consisted of a gift of a feud, evidenced and consummated by an actual or symbolical livery of seisin. It, of course, applied to corporeal hereditaments, or such incorporeal hereditaments as remainders or reversions, where the seisin which perfects the estate is committed to the holder of the particular estate as a kind of bailiff of the reversioner or remainder-man. It was always incumbent upon the feoffor to indicate in his gift the nature and duration of the estate which he intended to give the feoffee in the lands; and if no estate were limited therein, it was, constructively, an estate for the life of the feoffee. In carrying out the intention of the parties to the feoffment, it became customary to make written deeds, expressing the terms of the gift, though these did not obviate the necessity of livery of seisin. But the possession of a deed by one purporting to be grantee of an estate is no evidence of title in the grantor, unless shown *aliunde* to have been at some time in possession of the land granted, or his ownership is shown by some other evidence.[1]

[1] Smith *v.* Lawrence, 12 Mich. 434.

§ 2230. **"Gift" a Feoffment.** — A conveyance by "gift" is simply a feoffment, wherein the estate thereby limited or created is one in tail.[1] This is applying the term in its stricter sense; for, in its broader meaning, the word *gift* imports no more than the transferring of the property of a thing from one to another without a valuable consideration.[2]

§ 2231. **The Effect of a Conveyance by Feoffment** was, that as it passed the actual seisin, if it proposed to convey a fee-simple, it created an actual fee-simple in the feoffee, by right or by wrong, according as the feoffor was or was not seised in fee. Thus the feoffment, even of an idiot or lunatic, was held effectual till avoided by process of law. The effect upon contingent remainders of a feoffment made by him who had the particular estate has been heretofore considered. It was to do away with this form of conveyance, as a means of injuriously affecting the rights of third parties, that a recent statute in England has declared that no feoffment shall have any tortious operation.[3]

§ 2232. **Early Forms of Deeds of Feoffment.** — The deed or charter of feoffment was, originally, exceedingly brief and simple, as the reader may perceive by recurring to Appendix No. I. to the second volume of Blackstone's Commentaries.[4]

§ 2233. **Conveyance by Grant** was the common law mode of transferring or creating estates or interests in incorporeal hereditaments of which there could be no livery of seisin. This was always by deed, and these interests passed only by a delivery of the deed. And such is the law now. Thus a right to take coal or timber from one's land, or any easement in or over his land, being an interest in the land, can be effectually created or conveyed only by deed.[5] The difference between these two modes of conveyance gave rise to the expression with reference to the two classes of property, one "lying in livery," the other "in grant." The words made use of in a grant, in creating or passing the estate, differed but little from those employed in a feoffment; and the two

[1] 2 Bl. Com. 310–317.

[2] 3 Wood, Conv. 1.

[3] Stat. 8 & 9 Vict. c. 106, § 3; Wms. Real Prop. 121, 122; 4 Kent, Com. 481.

[4] See 4 Kent, Com. 480.

[5] Huff *v.* McCauley, 53 Penn. St. 206; Drake *v.* Wells, 11 Allen, 143.

modes varied from each other only in the subject-matter of the conveyance. By the statute above cited, it is now declared that the conveyance of an immediate estate of freehold in corporeal hereditaments shall be deemed to lie in *grant* as well as *livery*.[1]

§ 2234. **Effect of Grant and Feoffment on Title of others.** — One essential difference between a feoffment and a grant has already been referred to, — namely, their effect upon the interests of third persons; since grants cannot, like feoffments, create a tortious fee, but operate only upon the estate or interest which the grantor has in the thing conveyed, and can lawfully convey.[2] A feoffment visibly operated upon the *possession:* a grant could operate only on the *right* of the party conveying. As *possession* and *freehold* were convertible terms at the common law, a conveyance which was considered as transferring the possession was considered as transferring an estate of freehold, or as transferring the fee. But as grants only transferred a right, a conveyance of this kind could only transfer whatever estate the party had a right to convey. It is in this sense that a feoffment is said to be a tortious, and a grant to be a *rightful*, conveyance.[3] And where "give and grant" are followed by "bargained and sold," it qualifies the mode of gift and grant, and converts it into a bargain and sale, without its being a feoffment.[4]

§ 2235. **Grant not limited to Incorporeal Hereditaments.** — Grant is no longer confined to the conveyance of incorporeal hereditaments; and the term has been applied, by statute in New York, to the forms of deeds adopted there, though retaining, in all but name, the characteristics of the deeds previously in use in that State.[5] In New York, "grant" embraces conveyances of the inheritance of freehold and deeds of bargain and sale; in Vermont, it applies to all conveyances by deed, except those of gift; and in New Jersey, it means every ordinary mode of acquiring property by

[1] 2 Sharsw. Bl. Com. 317, and note.
[2] 4 Kent, Com. 490.
[3] Co. Lit. 271 *b*, n. by Butler, § 1.
[4] Matthews *v.* Ward, 10 Gill & J. 448.
[5] 4 Kent, Com. 491; Cornish, Purch. Deeds, 208.

deed, including such as operate by way of uses.[1] Wood, in his treatise on Conveyancing, says, "The word *grant*, taken largely, is where anything is granted or passed from one to another; and in this sense it comprehends feoffments, bargains and sales, gifts, leases in writing or by deed, and sometimes by word without writing."[2] Nor does the calling an instrument a lease affect the quantity of estate conveyed by it, although it is usually applied to a term for years. It may convey a fee.[3] *Dedi et concessi* may amount to a grant, a payment, a gift, a release, a confirmation, a surrender; and it is in the election of the party to use which of these purposes he will.[4]

[1] Ross *v.* Adams, 28 N. J. L. 165.

[2] 3 Wood, Conv. 7.

[3] Jamaica Pond Aq. Co. *v.* Chandler, 9 Allen, 168.

[4] Co. Lit. 301 *b*; Knight *v.* Dyer, 57 Me. 177; Shep. Touch. Prest. ed. 91.

CHAPTER CII.

FORMS OF CONVEYANCE — DEEDS UNDER THE STATUTE OF USES.

§ 2236. How the law gives effect to such deeds.
2237. Bargain and sale and covenant to stand seised to uses.
2238. Lease and release.
2239. Quitclaim deeds.
2240. Deeds liberally construed.

§ 2236. **How the Law gives Effect to such Deeds.** — The forms of conveyance which took their rise from the construction given to the statute of uses are: bargain and sale, covenant to stand seised, and lease and release. They all dispense with an actual livery of seisin; and, while they all recognize a seisin as essential to give effect to the conveyance, the statute transfers this, and *executes the use* by uniting the legal seisin with the equitable use, and thereby creating an entire legal estate of the two. Thus where a deed conveyed land to A and six other persons *nominatim*, and their heirs, giving an exclusive control of the granted premises and the income thereof to A for life, it was held, that, as to one-seventh, the use was executed in A in fee; and as to the six parts, the use was executed in A for life, with a remainder to the other grantees named.[1]

§ 2237. **Bargain and Sale and Covenant to stand seised to Uses.** — The difference theoretically between a bargain and sale and a covenant to stand seised consisted in the consideration out of which the use was raised to which the law united the seisin. In bargain and sale, it required this to be money, or something representing money. In covenant to stand seised, it consisted of relationship by consanguinity or affinity; though, as will hereafter appear, this distinction seems to have been sometimes lost sight of by the courts. Thus, in Massachusetts, it has been settled that a deed of covenant to stand seised may be good, although

[1] Chenery *v.* Stevens, 97 Mass. 77.

the consideration may be other than the relationship of blood or marriage between the grantee and grantor, or no such relationship exists.[1] And in Pennsylvania it is held, that, if a deed cannot take effect as a bargain and sale for a want of pecuniary consideration, it may do so as a covenant to stand seised, if a consideration of blood exists; and a recorded deed will have the effect of a deed of feoffment with livery of seisin, or as a deed under the statute of uses, as will best accomplish the intention of the parties.[2] But in New York it was held, that, if a deed be made without a pecuniary consideration, it cannot operate as a bargain and sale; and if without any tie of blood between the grantor and grantee, it cannot take effect as a covenant to stand seised.[3]

§ 2238. **Lease and Release.** — In a lease and release, the transfer of the seisin and estate from the grantor to the grantee was by a bargain and sale for a year, for example, for some valuable consideration, whereby a use for that time was raised in the bargainee, and the statute passed to him the legal possession of the land, and then by a release from the owner of the reversion, which did not require a livery of seisin. This last had to be done by deed, being a simple common law conveyance of a reversion. Both the lease and release were known to and in use under the common law. But, for the latter to become operative, it had to be made to one having an estate in or possession of the land; while a lease, before entry under it, created no estate in the lessee, but a mere *interesse termini*, as it was called. So that this mode of conveyance by lease and release derived its vital energy and effect from the possession which the law, under the statute of uses, gave to the lessee or bargainee for the year, thereby rendering him capable of acquiring the inheritance by a simple deed of release. It consequently required two deeds, and became the usual mode of conveyance in England till the recent statute 7 & 8 Vict. c. 106, above referred to (§ 2231); though the necessity of a formal lease had been removed by statute in 1841.[4] The statute

[1] Trafton *v.* Hawes, 102 Mass. 533; see also *post*, § 2280.

[2] Eckman *v.* Eckman, 68 Penn. St. 460.

[3] Jackson d. Saunders *v.* Cadwell, 1 Cow. 639, 640.

[4] Wms. Real Prop. 146; Rogers *v.* Eagle Fire Co., 9 Wend. 611, 628; Lalor, Real Estate, 249.

speaks of persons having a use "in fee-simple, fee-tail, for a term of life, or for years," and declares that they "shall henceforth stand, and be seised, deemed, and adjudged, in lawful seisin, estate, and possession, of and in the same," "of and in such like estates as they had or shall have in use in the same." In this way the interest is made an estate by the statute without the prerequisite, at common law, of an actual entry.[1] But though a sufficient estate is thereby created to give effect to a subsequent deed of release, it is still true that a lessee cannot maintain trespass before he shall have made an entry and gained actual possession.[2]

§ 2239. **Quitclaim Deeds.** — While a deed of simple release, made to one who has neither an estate in, nor possession of, land, would be merely void, a form of deed of the nature of a release, containing words of grant as well as release, commonly known as a "quitclaim deed," has long been in use in this country, and has not only been regarded practically as a mode of conveying an independent title to real property, but is, by the statutes of some of the States, declared to be effectual for that purpose. But a quitclaim deed does not pass any more title than the grantor has, and does not give the one who claims under it the rights of a *bona fidè* purchaser without notice.[3] If, therefore, one take such a deed, and pay a consideration for it, and the title fails, he has no remedy against his grantor in the absence of fraud on his part.[4] Yet, if the grantor have a title to land, a deed of quitclaim is just as effective to pass that title as a deed with covenants of warranty: and where one agreed to convey a good title to a certain parcel of land, and he had such a title, the tender of a deed of quitclaim of the land would be a performance of his agreement; the other contracting party cannot insist upon a covenant of warranty in his deed.[5]

§ 2240. **Deeds liberally construed.** — Courts, both in England and in this country, are very liberal in construing deeds, so as to give them effect, if possible; and, although intended to come

[1] Burton, Real Prop. § 131, p. 43, note.
[2] Lutwich *v.* Mitton, Cro. Jac. 604.
[3] May *v.* Le Claire, 11 Wall. 232. See *ante*, § 2213.
[4] Thorp *v.* Keokuk Coal Co., 48 N. Y. 253.
[5] Kyle *v.* Kavanagh, 103 Mass. 356.

within one class, if they cannot be made operative in that form, on account of some defect, they are often found capable, and permitted to accomplish the purposes of the parties, by a construction that brings them within some other class of deeds known to the law. Among the cases that might be selected as illustrations of this is the case of Exum *v.* Canty, where one made a deed whereby he covenanted with a trustee that he would stand seised of the estate to his own use during his own natural life, and, immediately on his death, to the use of the trustee in trust, that he should convey it to A B, his heirs, etc. The consideration stated in the deed was the love and affection he had for A B, and in consideration that he had before supported the grantor, and had agreed to do so thereafter. But there was no relationship between the grantor and A B. The court sustained the deed, saying, "The instrument was in effect a conveyance which took effect upon its execution and delivery, vesting an interest in them to take effect in possession at the death of the grantor. It was plainly a covenant to stand seised to the use of the parties for whose benefit the property was intended to be conveyed, whose estate vested in possession at the determination of his estate for life reserved in it."[1] So in Alabama, a deed made for love and affection for a grandchild was held to be good, under the doctrine of uses, as a covenant to stand seised, if not good as a bargain and sale for want of a pecuniary consideration; although the words used were "give, grant, bargain, sell, alien, enfeoff, and convey."[2] In Steel *v.* Steel, a memorandum was attached to a deed granting the premises in terms, which stated that the grantor did not intend to convey the same until after his decease and that of his wife; and it was held to postpone the right of the grantees to have possession of the estate conveyed until after the death of the grantor or his wife.[3]

[1] Exum *v.* Canty, 34 Miss. 569. See also Wall *v.* Wall, 30 Miss. 91, held to be a covenant to stand seised, though in many respects like a testamentary declaration. See also Edwards *v.* Smith, 35 Miss. 197, where the question was, whether the instrument should take effect as a will or a deed. 2 Lomax, Dig. 141; Eckman *v.* Eckman, 68 Penn. St. 460, § 2237.

[2] Horton *v.* Sledge, 29 Ala. 478, 496.

[3] Steel *v.* Steel, 4 Allen, 417, 424.

CHAPTER CIII.

FORMS OF CONVEYANCE — DEEDS IN USE IN THE UNITED STATES.

§ 2241. Statutory forms.
2242. Form in Massachusetts.
2243. Forms in Maine.
2244. Form in Connecticut.
2245. Form in North Carolina.
2246. Form in Virginia.
2247. Form in Maryland.
2248. Form in New Hampshire.
2249. Form in South Carolina.
2250. Form in Pennsylvania.
2251. Form in New Jersey.
2252. Form in Vermont.
2253. Form in Ohio.
2254. Form in Iowa.
2255. Form in Illinois.
2256. Form in Tennessee.
2257. Form in New York.
2258. Form in New York, continued.
2259. Form in Minnesota.
2260. Form in Georgia.
2261. Form in Indiana.
2262. Form in Mississippi.
2263. Forms in the other States.
2264. How modern statutes make deeds operative without the statute of uses.

§ 2241. **Statutory Forms.** — Many of the States have prescribed forms of deeds in their statutes; but this has generally been regarded rather as a matter of direction and declaration that such a form would be sufficient, than that it should be required. Most of these statutes, in fact, directly or indirectly refer to the common law modes as familiar and effectual forms of conveyance. Thus, while the form of deed in common use in Massachusetts is borrowed from the ancient charter of feoffment, modified by a declaration of the uses to which the estate is to be held, the statute expressly refers to "bargain

and sale," and "other like conveyance of an estate," and declares that "a deed of quitclaim and release, of the form in common use in this State, shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale." [1]

§ 2242. **In Massachusetts, the Form of Deeds in use** is said to be a free translation of the old charter of feoffment, omitting the *reddendum*, and adding a covenant of warranty, while it is held that deeds of release and quitclaim are effectual to pass whatever estate the grantor could convey by bargain and sale. If the deed in use is examined, it will be found to give, grant, bargain, sell, and convey, stating a consideration, and limiting the granted premises to the grantee and his heirs, *to his and their use.* Yet the only effect of this is to exclude the idea of a resulting use; for such a conveyance, as has been heretofore shown, takes effect at common law, and not by the statute of uses, since the grantee or feoffee and *cestui que use* are one and the same person. But the cases have been numerous where substantially the same form of deed has been held to be a conveyance under the statute of uses, most generally, if the relationship of the parties is shown, as covenants to stand seised. Thus a deed recorded without being acknowledged, where the consideration was natural affection for a son, and five shillings, was held to be a covenant to stand seised.[2] On the other hand, where the deed was one of bargain and sale to A to the use of B, which, by a strict application of the English law of uses, would be a trust for B, it was held, that the deed might be construed a feoffment to A to the use of B, which would be executed in B.[3] In the same case the court held that the statute of uses formed a part of the common law of the State. In another case, a father conveyed to a son, in consideration of $400, to have and to hold, etc., after the death of the grantor, with covenants of seisin and warranty. The court held the conveyance to be a covenant to stand seised to the use of the grantor during his life, and after his death to the

[1] Hunt *v.* Hunt, 14 Pick. 374; Wade *v.* Howard, 6 Pick. 499. And see Bayer *v.* Cockerill, 3 Kan. 282.

[2] Cox *v.* Edwards, 14 Mass. 492.

[3] Marshall *v.* Fisk, 6 Mass. 24, 32; Hunt *v.* Hunt, 14 Pick. 374, 380.

use of the grantee, etc.[1] In another case, where the deed was in form a release and quitclaim to one who was not in possession, it was held, that the deed might be construed a bargain and sale or other lawful conveyance by which the estate might pass, "the recording of the deed being by law equivalent to an actual livery and seisin."[2] This latter circumstance was wanting in the first case above cited, since the recording of a deed without its being acknowledged has no validity as a record.[3] So where the deed was by a grandfather to his grandson, in consideration of his living with the grantor during life, to come into possession when twenty-one years old, it was held to be a covenant to stand seised, as it could not be a bargain and sale, since it purported to convey a freehold *in futuro*.[4] So where a father conveyed to a daughter, reserving the use of his estate during his life and that of his wife, it was held a covenant to stand seised to the use of the grantor for life, remainder to the use of the wife, though not named as grantee in the deed, remainder to the use of the daughter, in whom the use was finally executed as a remainder, and not as a springing use.[5] In some of the cases cited, the consideration mentioned was a pecuniary one, though in fact a relationship of some sort was proved to exist between the grantor and grantee. And now it is settled in Massachusetts that a covenant to stand seised may be effectual to pass a title, though based upon a valuable consideration alone.[6] Deeds of quitclaim are in use.[7]

§ 2243. **Forms of Deeds in Maine.** — In Maine, there are the same forms and rules substantially as in Massachusetts, as to applying uses, in conveyances by deed. Thus a grant to a corporation not yet *in esse*, for pious uses, was held to give the grantor the right of possession until the grantees came into being, and then the estate and right of possession passed to

[1] Wallis *v.* Wallis, 4 Mass. 135.

[2] Pray *v.* Pierce, 7 Mass. 381; Russell *v.* Coffin, 8 Pick. 143, 152.

[3] Blood *v.* Blood, 23 Pick. 80.

[4] Parker *v.* Nichols, 7 Pick. 111; Gale *v.* Coburn, 18 Pick. 397. See Marden *v.* Chase, 32 Me. 329.

[5] Brewer *v.* Hardy, 22 Pick. 376. See Thatcher *v.* Omans, 3 Pick. 522, a deed by husband and wife of wife's land to another, to the use of husband and wife, made an effectual conveyance to them both.

[6] Trafton *v.* Hawes, 102 Mass. 533.

[7] See note to previous section.

them.[1] So where a husband and wife made a deed, reserving the improvement of one half of the premises for the lives of the husband and his wife, as there was no such relationship between the parties as to apply the doctrine of covenant to stand seised, the law of this State requiring the consideration for such a conveyance to be a good one, it was held, that, as to one half of the estate, the conveyance might be construed to be a feoffment to the use of the grantor, and then to the use of his wife; and as to the other half, that the use was executed in the grantee.[2] These cases will justify the language of the courts in several cases where they have stated, in effect, that a conveyance of land, by deed, may be considered any species of conveyance necessary to effect the intent of the parties to the deed, and not repugnant to the terms of it.[3] In Rhode Island, it is held that the statute of uses is part of the law of the State, and will execute the legal title of a mere dry or passive trust or use, in the *cestui*.[4]

[1] Shapleigh *v.* Pilsbury, 1 Me. 271.

[2] Emery *v.* Chase, 5 Me. 232.

[3] Marshall *v.* Fisk, 6 Mass. 24, 32; Emery *v.* Chase, 5 Me. 232; Foster *v.* Dennison, 9 Ohio, 121. Although the statute of uses is recognized in Maine in conveyances of estates to begin *in futuro*, yet the courts of that State place the validity of such deeds upon a broader ground, and say that under the statutes of the State, a person owning real estate having a right of entry on it, whether seised of it or not, may convey such interest or any part of it by a deed acknowledged and recorded, with such limitations as the grantor pleases, provided they do not violate any rule of public policy. Thus, in Wyman *v.* Brown, 50 Me. 139, Walton, J., says: "We are also of opinion that effect may be given to such deeds [of a future estate] by force of our own statutes, and independently of the statute of uses. Our deeds are not framed to convey a use merely, relying upon the statute to annex the legal title to the use. They purport to convey the land itself, and being duly acknowledged and recorded as our statutes require, operate more like feoffments than like conveyances under the statute of uses," and holds that a deed conveying a freehold to begin at a future day is valid. So in Abbott *v.* Holway, 72 Me. 298, Barrows, J., after reciting the provisions of the statute, says: "Can it be doubted that under such statutes the owner of real estate can convey, in the manner prescribed, such part or portion of his estate as he and his grantee may agree, subject only to those restrictions which the law imposes as required by public policy, but relieved from the technical doctrines which arose out of the ancient feudal tenures, and all the restrictive effect which they had upon alienations? Why prevent the owner in fee-simple from agreeing with his grantee and setting forth that agreement in his conveyance as to the time when and the conditions on which the instrument shall be operative to transfer the estate from one to the other?"

[4] Sprague *v.* Sprague, 13 R. I. 701.

§ 2244. **In Connecticut**, the statute of uses is held to form a part of the common law, and has often been applied in giving effect to what would otherwise have been an informal and inoperative deed. Thus, in one case, the grant was to A in trust for B during her life, and after her death to her children and their heirs; and it was held not to be a trust in which the legal estate was in A, but a use executed in B for life, and her children in remainder in fee.[1] So, in a case similar to that above cited of Brewer *v.* Hardy, the court held the deed to be a covenant to stand seised to the grantor's own use during life, and then to the use of the grantee.[2] In another case, the deed, for a nominal consideration of ten dollars, conveyed the estate to a daughter, reserving the use and improvement to the grantor's wife so long as she remained the grantor's widow, he then being sick and about to die. It was held, that it might either be a feoffment to uses, or a covenant to stand seised to the use of the wife, and after to the use of the daughter.[3] In this State, as in Massachusetts, the record of a deed is equivalent to an actual livery of seisin.[4] A quitclaim is a primary conveyance, and vests the releasee with all the interest which the releasor has, even a fee.[5]

§ 2245. **In North Carolina**, the court recognized the existence and application of the doctrine of uses, in a case where the deed was held inoperative, as being neither a conveyance at common law, nor under the statute of uses. It was to A for life, and at her death to her two children and their heirs, with covenants of warranty against all claims but those of the grantor during his natural life. No consideration was expressed or proved. There was no relationship between the parties, nor was there any use declared in the deed. It was held not to be a feoffment, as no seisin or possession was delivered, nor a bargain and sale for want of a valuable consideration, nor a covenant to stand seised for the like want of a requisite consideration,[6] and therefore void altogether.

[1] Bacon *v.* Taylor, Kirby, 368.

[2] Barrett *v.* French, 1 Conn. 354; Brewer *v.* Hardy, 22 Pick. 376.

[3] Bryan *v.* Bradley, 16 Conn. 474.

[4] Barrett *v.* French, 1 Conn. 354.

[5] Sherwood *v.* Barlow, 19 Conn. 471.

[6] Den d. Springs *v.* Hanks, 5 Ired. 30. But the later cases in North Carolina

§ 2246. **In Virginia**, a case occurred of a deed from a brother to a sister, in which the words of conveyance were "give, grant, and deliver," with covenant of warranty. No seisin was indorsed; and it was contended that it was a deed of feoffment, which was not good without livery of seisin. But the court held it to be a good covenant to stand seised, "the use being forthwith executed in possession by force of the statute of uses."[1] By statute in that State, the effect of a conveyance by a bargainor to a bargainee is to transfer the possession to the use as perfectly as if the bargainee had been enfeoffed with livery of seisin of the land conveyed.[2]

§ 2247. **In Maryland**, bargain and sale has nearly superseded all other modes of conveyance, and the rules applicable to such deeds seem to be the same as in England. The use is executed in the bargainee by the statute, and a limitation to the use of any one but the bargainee converts it into a trust, the bargainee having the legal estate, and the person named as *cestui que use* becoming thereby the *cestui que trust*.[3] It is moreover held, that to constitute a conveyance a bargain and sale, the consideration must be a *pecuniary* one; and where it was recited to be *land*, the conveyance could not operate as a bargain and sale, though a general recital of divers valuable considerations or the like would be sufficient.[4] If the consideration be blood, marriage, or natural affection, the deed must operate as a covenant to stand seised, and not as a bargain and sale. But a deed in the form of a bargain and sale, containing the words "give and grant," might operate as a feoffment, if accompanied with a

hold that all deeds are put by statute upon the footing of feoffments, which take effect by livery of seisin, and need no consideration, as between the parties to support them. Love *v.* Harbin, 87 N. C. 249; Mosely *v.* Mosely, id. 69.

[1] Rowletts *v.* Daniel, 4 Munf. 473.

[2] Tabb *v.* Baird, 3 Call, 475; Duval *v.* Bibb, id. 362. As to the only statute of uses ever enacted in Virginia, see Ocheltree *v.* McClung, 7 W. Va. 232, where a long discussion of the effect of deeds of various kinds is given by the court.

[3] Matthews *v.* Ward, 10 Gill & J. 443; Brown *v.* Renshaw, 57 Md. 67. If the deed is such in form as to be valid as a deed of feoffment, and is expressed to be to the use of the grantee and his heirs, in trust for a third, the last provision is equitable merely; for although the statute expressly says "to the use of another," yet the intention has been considered broad enough to allow the statute to operate where the use is that of the grantee himself. Ibid. The statute of uses does not apply to leasehold property. Warner *v.* Sprigg, 62 Md. 14.

[4] But see 2 Sand. Uses, 47.

livery of seisin, although, for the reasons above stated, it would not pass the estate as a bargain and sale.[1] Now, however, the enrolment of the deed is equivalent to livery of seisin, the ancient form of livery having become obsolete.[2] Deeds of bargain and sale are sufficient to pass any freehold in possession, reversion, or remainder, unless the bargainor be out of actual or constructive possession of the same.[3] A case, moreover, is reported, which was decided in 1750, where it was held, that one who had a seisin in law, but never an actual seisin, might convey by lease and release, there being no one in adverse possession at the time.[4]

§ 2248. **In New Hampshire**, it was declared by statute in what mode lands might be conveyed, and the form prescribed required the attestation of two witnesses to the deed. But it was held, that this did not exclude other modes known to the common law; and accordingly, where a father conveyed to a son, who at the same time, by deed not witnessed, leased and quitclaimed the estate to the father during his life, the court held, that the only way in which these two instruments could be carried into effect was under the statute of uses; that this statute was brought with the original colonists as a part of their common law, and was in force here, and that the deed without witnesses, as an instrument of conveyance, was a covenant on the part of the son to stand seised to the use of the father, the statute executing the use in the father, who was thereby entitled to possession of the premises. This, and bargain and sale as a mode of conveyance, were recognized by the court as valid forms in that State.[5] The statute of uses is expressly recognized as in force in this State, and has been variously applied :[6] thus a covenant to stand seised to the use of the covenantor during life, and after his death to the use of A B,

[1] Cheney *v.* Watkins, 1 Har. & J. 527.

[2] Matthews *v.* Ward, 10 Gill & J. 443.

[3] Mason *v.* Smallwood, 4 Har. & M'H. 484.

[4] Lewis *v.* Beall, 4 Har. & M'H. 488.

[5] French *v.* French, 3 N. H. 234; Chamberlain *v.* Crane, 1 N. H. 64; Pritchard *v.* Brown, 4 N. H. 397. It has been held that though a contingent remainder may be barred by a conveyance of the particular estate by feoffment, it would not be by a conveyance under the statute of uses, nor under the form recognized by the statute of the State. Dennett *v.* Dennett, 40 N. H. 498.

[6] Hutchins *v.* Heywood, 50 N. H. 491.

was held to create a remainder in A B.[1] So a deed to A to the use of a corporation vests the estate in the corporation.[2] So a devise to A in trust for B, for life, and after his death for others, was held to create an executed estate divested of any trust, there being no duty imposed upon the trustee.[3] But still, to give validity to a deed, the statute requires it to be attested by two subscribing witnesses.[4] And, until a change in the statute, a deed not so attested would have been of no avail against even the grantor and his heirs, though the law now makes it good against these.[5]

§ 2249. **In South Carolina**, a statute of the year 1731 provided that no deed of feoffment should be impeached for want of enrolment thereof. And a statute of 1795 provides for a form of conveyance, but does not invalidate those already in use.[6] It has been held that a covenant to stand seised is a valid mode of conveying lands in that State, and that a freehold may thereby be created to take effect *in futuro*.[7] The statute of uses is also recognized, and the rule in that State is that if land is conveyed to one for the use of another, and the grantee has no active duties to perform, and no reason for preserving a trust exists, the legal title vests in the beneficiary.[8] Bargain and sale is regarded as a valid mode of conveyance; although lease and release was usually employed until 1795.[9]

§ 2250. **In Pennsylvania**, it was reported by the judges of the Supreme Court, that among the English statutes in force there were the first to the seventh with the ninth and tenth sections of the statute of uses;[10] and many cases have arisen in that State in which this statute, as affecting conveyances of lands, is expressly recognized.[11] In one of these cases, it was held to be

[1] Rollins *v.* Riley, 44 N. H. 11. [2] Wilcox *v.* Wheeler, 47 N. H. 490.

[3] Hayes *v.* Tabor, 41 N. H. 521.

[4] Stone *v.* Ashley, 13 N. H. 38; Underwood *v.* Campbell, 14 N. H. 396; Cram *v.* Ingalls, 18 N. H. 616.

[5] Kingsley *v.* Holbrook, 45 N. H. 320.

[6] Redfern *v.* Middleton, Rice, 464.

[7] Kinsler *v.* Clark, 1 Rich. 170; Chancellor *v.* Windham, id. 161.

[8] Bouknight *v.* Epting, 11 S. C. 71; Cribb *v.* Rogers, 12 S. C. 564; Burnett *v.* Burnett, 17 S. C. 545; Howard *v.* Henderson, 18 S. C. 184.

[9] Craig *v.* Pinson, Cheves, 272. [10] 3 Binn. 599.

[11] Ashhurst *v.* Given, 5 Watts & S. 323; Wilt *v.* Franklin, 1 Binn. 502; Sprague *v.* Woods, 4 Watts & S. 192; Okison *v.* Patterson, 1 Watts & S. 395.

sufficient to give effect to the statute, and raise a use, if there was an acknowledgment of a previous consideration, although the jury found that none had been paid.[1] It has also been held, that a use may be raised by a deed of bargain and sale, or any other form of conveyance duly recorded, in any one in whose favor it is expressly declared by the deed, though no consideration be expressed;[2] though in an earlier case it had been decided, that in order to raise a use by bargain and sale, a valuable consideration must be acknowledged in the deed, but the amount need not be stated.[3] It is not proposed here to examine the question raised in some of those cases, whether or not a trust is raised by certain forms of expression in deeds, but merely to show how far the English statute of uses has been adopted in this State. It should be added, that, by statute, all deeds made and executed in the form therein prescribed are as valid as deeds of feoffment with livery of seisin at the common law.[4]

§ 2251. **In New Jersey**, a statute of the State accomplishes very much the same thing as the statute of 27 Hen. VIII., declaring that wherever uses are limited, granted, released, sold, given, or conveyed by deed, grant, etc., the grantees are to be in as full possession as if they were possessed by solemn livery of seisin and possession. The purposes of this statute have been declared to be to unite or transfer the possession to the use, and to declare the nature and quality of such possession. But though the one entitled to the use in lands is declared to be in as full possession as if possessed by solemn livery, it has been held, that a deed of bargain and sale will not, any more than in England, operate to convey or affect any estate which is not in the bargainor.[5]

[1] Wilt *v.* Franklin, 1 Binn. 502.

[2] Sprague *v.* Woods, 4 Watts & S. 192.

[3] Okison *v.* Patterson, 1 Watts & S. 395.

[4] 2 Smith, Lead. Cas. (5th Am. ed.) 453.

[5] Den d. Micheau *v.* Crawford, 8 N. J. L. 107. See Price *v.* Sisson, 13 N. J. Eq. 168. But where one who had a life-estate, with a possibility that a contingent estate in fee might vest in him as survivor, conveyed by a deed purporting to grant, bargain, and sell a fee-simple, and the fee afterwards vested in the grantor, it was held that he and one claiming under him with notice were estopped from asserting that the deed passed only a life-estate to the grantee. Hannon *v.* Christopher, 34 N. J. Eq. 459. Cf. Goodell *v.* Hibbard, 32 Mich. 47.

§ 2252. **In Vermont**, the superior court of the State, by Redfield, C. J., held, that the English statute of uses was not in force, though Thompson, J., of the United States court, had held otherwise in the same district. And one reason suggested by the former why the statute was not needed was, that the courts of equity in that State had full power to accomplish the intention of the parties to deeds, without resorting to the doctrine of that statute.[1]

§ 2253. **In Ohio**, it is said that uses are not in force, and that the system of conveyancing in use there does not depend upon the statute 27 Hen. VIII., but has taken its form and derives its authority from the State statutes and local usages. A deed, for instance, to P. H., in trust for the heirs and devisees of P. H., was held in that State to create a trust. But still, both by the ordinance of 1787 and the courts and writers upon the law of that State, the conveyances employed there were held to be derived from the statute of uses, and reference is constantly made to the modes of conveyance which had grown up in other States and in England under this statute. Thus it is said: "Our only conveyances are those which originated under the statute of uses; but, in all other respects, our law of real property is the same as if that statute had never been enacted."[2] The ordinance of 1787 prescribed bargain and sale, and lease and release, as the modes of conveying land: "We hold the mere execution and delivery of the deed, without any other ceremony, completes the conveyance. We hold some pecuniary consideration necessary, which was not in a feoffment, because, without such consideration, a use could not be raised." And in giving the opinion in Foster *v.* Dennison, Lane, C. J., says: "A deed may be held to operate in any form of conveyance that will carry into execution the lawful objects of the maker, whether the form be feoffment, grant, bargain and sale, or release, and the deed may enure as either."[3] A knowledge, therefore, of the

[1] Gorham *v.* Daniels, 23 Vt. 600, decided in 1851. Held generally, that the statute of uses seems to have been adopted in New England. Society, etc. *v.* Hartland, 2 Paine, C. C. 536; Sherman *v.* Dodge, 28 Vt. 26.

[2] Walk. Am. Law, 311; Helfenstine *v.* Garrard, 7 Ohio, 275.

[3] Foster *v.* Dennison, 9 Ohio, 124.

law of uses seems to be requisite in order to understand and apply the forms of conveyance in use in that State.

§ 2254. **In Iowa**, uses are embraced in their code under the term "real estate," and are accordingly inheritable, and subject to the rules of conveyance. There are short forms in use.[1] And no seals are required to convey lands in that State.[2]

§ 2255. **In Illinois**, the statute of uses is substantially re-enacted by a statute of the State, which will, in case of a dry trust or use, vest the title in the *cestui*,[3] but not if the trust is active.[4]

§ 2256. **In Tennessee**, the statute of uses is said not to be in force. Short forms of deeds are given in the statute. The same rules are adopted concerning active and passive trusts, as if the statute of uses were in force; i. e., that a merely passive trust or use vests the legal estate in the beneficiary, while in an active trust the title is in the trustee.[5] It has been held by the court, that though the title to land under the statute of Tennessee does not, on the one hand, pass by operation of the statute of uses, but by deed registered, yet still, on the other hand, such deed does not, like an ancient feoffment, work a disseisin.[6]

§ 2257. **In New York**, essential changes were made in the law regulating real property by the revised code of 1827, and, among other things, in the matter of uses. Previous to that, numerous cases had arisen in which the doctrine of the English statute had been applied. In one it is stated, that as early as 1779, and so on till 1788, when the English statutes were abolished, the form of conveyance in the State was lease and release.[7] In another it is said, that the words remise, release, and forever quitclaim, or release and assign, will raise a use

[1] Funk *v.* Cresswell, 5 Iowa, 68.

[2] Pierson *v.* Armstrong, 1 Iowa, 282, 294.

[3] Witham *v.* Brooner, 63 Ill. 344; Shackelton *v.* Sebree, 86 Ill. 616, 620; Kellog *v.* Hale, 108 Ill. 164. As to what is a dry trust, see Preachers' Aid Soc. *v.* England, 106 Ill. 125.

[4] Preachers' Aid Soc. *v.* England, 106 Ill. 125.

[5] Turley *v.* Massengill, 7 Lea, 353; Hooberry *v.* Harding, 10 id. 392.

[6] Miller *v.* Miller, Meigs, 484.

[7] Jackson d. Ludlow *v.* Myers, 3 Johns. 388.

by way of bargain and sale, and that, by any words amounting to a present contract of sale or bargain, a use is raised which the statute will execute, and that it would be sufficient that a valuable consideration was paid, whether it was expressed or not.[1] In another, the language of the deed was, "For value received, I hereby make over and confirm to," etc.; and it was held, that this was enough to raise a use, as "the statute there performs the task of the ancient livery of seisin."[2] And in accordance with what has been repeated under the English rule, and that adopted in other States, if the use in a deed of bargain and sale were to another than the bargainee, it would create a trust, and not be a use which the statute would execute.[3] In Jackson *v.* Dunsbagh, the court were inclined to hold, that a future use might be raised by means of a deed of bargain and sale, the use in the mean time resulting to the bargainor, and that a covenant to stand seised may be sustained in this country upon a pecuniary consideration.[4]

§ 2258. **The Law of New York, continued.** — For the changes in the law of New York as to real property, effected by the revised statutes of 1827, reference is chiefly made to Mr. Lalor's work, presenting the text of the statute, the reviser's notes, and the cases decided under the statute. By that statute, "uses and trusts, except as authorized and modified in this article, are abolished." The exception relates to trusts, properly so called; so that, in terms, uses are abolished. But whatever might have been accomplished by means of uses is effected in the form of statutory provisions incorporated in the act. Among other things, a *grant* is made effectual without livery of seisin. In the language of the revisers, "the new modifications of property which uses have sanctioned are preserved by repealing the rules of the common law by which they were prohibited, and permitting every estate to be created by grant which can be created by devise. And this is the effect of the provisions in relation to expectant estates con-

[1] Jackson d. Salisbury *v.* Fish, 10 Johns. 456.

[2] Jackson d. Bond *v.* Root, 18 Johns. 79.

[3] Jackson d. White *v.* Cary, 16 Johns. 302; Jackson d. Ludlow *v.* Myers, 3 Johns. 388.

[4] Jackson d. Trowbridge *v.* Dunsbagh, 1 Johns. Cas. 91. But see Jackson d. Saunders *v.* Cadwell, 1 Cow. 622.

tained in the first article of this title."[1] The statute confirmed every estate then held as an executed use. Every person who by grant or devise should be entitled to the actual possession of land, and the receipt of the rents and profits in law or in equity, was deemed to have the legal estate therein of the same quality, etc., as his beneficial estate. A contingent remainder in fee may be created on a prior remainder in fee in certain cases mentioned. Freeholds might be created *in futuro*, and a fee might be limited on a fee, upon a contingency within prescribed limits as to perpetuity.[2] And now conveyances are made by grant simply.[3] The law of Alabama is substantially like that of New York. Where a deed was to one with a use, trust, or confidence, for another, it was accordingly held to create in the beneficiary the same estate as if the deed had been made directly to him.[4]

§ 2259. **In Minnesota**, certain requisites in deeds are prescribed by statute, more or less contravening the common law; as, for instance, that deeds must be made directly to the person in whom the possession and profits are intended to be vested, and not to the use of or in trust for such person. This, of course, excludes feoffments to uses; but the statute of that State no further interferes with the forms of deeds than by simply declaring that "conveyances of lands may be made by deed executed," etc.[5]

§ 2260. **In Georgia**, no prescribed form is essential to the validity of a deed of lands or personalty. If sufficient in itself to make known the transactions between the parties, no want of form will invalidate it.[6]

§ 2261. **In Indiana**, deeds are sustained as deeds of bargain and sale, upon the same ground as that upon which they were

[1] Lalor, Real Est. 119, 124.

[2] Lalor, Real Est. 86, 92, 154; Coster *v.* Lorillard, 14 Wend. 265–399, where the whole subject is considered.

[3] Wms. Real Prop. 153, Rawle's note. But in Eysaman *v.* Eysaman, 24 Hun, 430, it is held that a conveyance by a covenant to stand seised is valid, and will be executed by the statute of uses.

[4] You *v.* Flinn, 34 Ala. 411–414; Horton *v.* Sledge, 29 Ala. 496; Schaffer *v.* Lavretta, 57 Ala. 14; Brewton *v.* Watson, 67 Ala. 121.

[5] See statutes, *ante*, at the end of chapter c.

[6] See statutes, *ante*, at the end of chapter c.

held valid by the English courts under the statute of uses. In Givan *v.* Doe, the court regards the deed "as a deed of bargain and sale of the land in controversy. By that deed, the use of the premises passed to the bargainee, and the statute of uses transferred to him the possession." The English statute of enrolments was never in force in that State; and deeds of bargain and sale are held valid between the parties, though never acknowledged or recorded.[1]

§ 2262. **In Mississippi**, the words "give, grant, and release," are sufficient in a deed to convey an estate, although the grantor is not in possession.[2]

§ 2263. **In the Other States.** — It is not within the scope of this work to cumber the text with the laws of all the States on this subject. Enough has been said to afford the reader an idea of how the courts have fitted statutory innovations upon the old English system of conveyancing. In a note at the end of a former chapter will be found an epitome of the State statutes, and to this the reader is referred.

§ 2264. **How Modern Statutes make Deeds operative without the Statute of Uses.** — It may be said, to sum up the foregoing remarks, that in almost all of the United States, a writing which contains a grantor, a grantee, a description of the land or interest therein granted, and words which may be construed to imply a grant by the grantor to the grantee, is a sufficient deed, if executed according to the law of the State where the land is situated. Such a deed is not strictly a deed of feoffment, as no livery of seisin is necessary; nor is it a deed operating by the statute of uses. It is rather a deed resulting from the various statutes which have been from time to time enacted in the various States, and it is substantially and practically the same in all the States. The effect of these statutes is well described in two Maine cases previously cited, in which the court says, that, under the statutes of the State, a person owning real estate, having a right of entry on it, whether seised of it or not, may convey such interest, or any part of it, by a deed acknowledged and recorded, with such limitations as the grantor pleases, provided they do not violate any rule of

[1] Givan *v.* Doe d. Tout, 7 Blackf. 212.

[2] Fairley *v.* Fairley, 34 Miss. 18.

public policy.[1] By such a deed estates *in futuro* may be conveyed as well as estates *in præsenti*.[2] This being the case, there seems to be little necessity left for the operation of the statute of uses, although it is often mentioned by the courts as supporting deeds of future interests. There are, however, cases where the conveyance does not contain suitable words to imply a grant, but does contain words which may fairly imply a covenant or agreement in regard to the title of the land. In such cases, the statute of uses is still sometimes relied upon to give effect to these deeds as deeds of bargain and sale, or covenant to stand seised.[3] A more effectual and common way of enforcing such instruments, where a valuable consideration has been paid, is to apply to a court of equity to compel a valid legal conveyance of the land.[4] Under the statutes before referred to, the deeds operate as deeds of feoffment; yet livery of seisin is unnecessary, the deed itself vesting the seisin in the grantee.[5]

[1] Wyman *v.* Brown, 50 Me. 139; Abbott *v.* Holway, 72 Me. 298; Bell *v.* McDuffie, 71 Ga. 264; Ferguson *v.* Mason, 60 Wis. 377.

[2] Abbott *v.* Holway, 72 Me. 298.

[3] Eysaman *v.* Eysaman, 24 Hun, 433.

[4] Pomeroy, Eq. Jurisp. § 1405 *et seq.*

[5] Witham *v.* Brooner, 63 Ill. 344; Shackelton *v.* Sebree, 86 Ill. 620; Love *v.* Harbin, 87 N. C. 249; Ocheltree *v.* McClung, 7 W. Va. 232; Wyman *v.* Brown, 50 Me. 139; Abbott *v.* Holway, *supra.*

CHAPTER CIV.

FORMS OF CONVEYANCE — COMPONENT PARTS OF DEEDS.

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2299. Appurtenances pass with the land.
2300. Of appurtenant easements passing.
2301. What rights pass as appurtenant.
2302. Same subject, continued.
2303. Same subject, continued.
2304. Grant of incident cannot carry principal thing.
2305. Constituents pass under general grant.
2306. Same subject, continued.

§ 2307. Of gold and silver mines passing with land.
2308. Land cannot pass as appurtenant.
2309. Of land passing as parcel though nominally appurtenant.
2310. "Messuage."
2311. Punctuation not regarded.
2312. Deed construed against the grantor.
2313. Every part given effect if possible.
2314. General obvious intent governs.
2315. Which of repugnant clauses governs.
2316. Uncertainty of description vitiates deed.
2317. "*Falsa demonstratio non nocet.*"
2318. General controlled by particular descriptions.
2319. Illustrations.
2320. Of parol evidence to explain deed.
2321. Illustration.
2322. Quantity not a controlling factor.
2323. Courses and distances.
2324. Monuments and boundaries preferred.
2325. What may be referred to to ascertain boundaries.
2326. Where only three sides are given.
2327. Where the quantity is certain and only one side is given.
2328. Grant of undivided half.
2329. Meaning of compass terms.
2330. Lines, how run between monuments.
2331. Ownership lines as monuments.
2332. What monuments must be in existence when deed is made.
2333. Void description validated by location.
2334. Unnavigable streams as boundaries.
2335. What are navigable streams.
2336. Navigable rivers — Line of riparian ownership.
2337. Fresh water ponds and lakes as bonndaries.
2338. Tidal streams as boundaries.
2339. The sea and its arms as boundaries.
2340. Massachusetts ordinance as to flats.
2341. Highways as boundaries.
2342. Artificial objects of width as boundaries.
2343. Parol evidence to identify monuments.
2344. Parol evidence of supposition of parties.
2345. Reputation and hearsay to establish boundaries.
2346. Declarations of deceased owners.
2347. Declarations of deceased owners, continued.
2348. Reference by one deed to another adopts its description.
2349. Meanings of particular words in descriptions.
2350. Effect of reference to maps or plats.
2351. Of recitals in deeds and their effects.
2352. Exceptions, how made, and of what.
2353. Distinction between exception and reservation.
2354. What may be excepted.
2355. The incidents to an exception.
2356. Illustrations.
2357. The *habendum*.
2358. *Habendum*, construction and effect.
2359. *Habendum* has no effect on what is not granted.
2360. *Habendum* must not be repugnant to grant.

§ 2361. *Habendum* serves to limit the uses.
2362. The *reddendum*.
2363. Reservation must be to the grantor.
2364. Limitations of reservations the same as of grants.
2365. Reservation must be out of the estate granted.
2366. Reservations of rents.
2367. Conditions in deeds.

§ 2265. **Parts of a Deed enumerated.** — Of the parts into which Lord Coke and the early writers divided the deeds then in use, there are now retained the premises, the *habendum*, the *tenendum*, the *reddendum*, condition, warranty, and covenants.[1] A warranty deed-poll of the form in use in Massachusetts is given below, as an example of the deeds in common use in the United States in those States where no statutory short forms are prescribed; premising, however, that in many of the States the form used is that of an indenture.*

§ 2266. **Simple Grant sufficient without other Parts.** — It is usual to follow a division, somewhat like the one above given, when considering the constituent elements of a good deed, and

* Note. — Know all men by these presents, that I, A B, in consideration of —— to me paid by C D, etc., the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said C D the following-described, etc. ——. To have and to hold the aforegranted premises, with all the privileges and appurtenances to the same belonging, to the said C D, his heirs and assigns, to his and their use and behoof forever. [Then usually follow these covenants:] And I, the said A B, for myself, my heirs, executors, and administrators, do covenant with the said C D, his heirs and assigns, that I am lawfully seised in fee-simple of the aforegranted premises; that they are free from all incumbrances; that I have good right to sell and convey the same to the said C D, his heirs and assigns forever, as aforesaid; and that I will, and my heirs, executors, and administrators shall, warrant and defend the same to the said C D, his heirs and assigns forever, against the lawful claims and demands of all persons. In witness whereof, I, the said A B, with E F, wife of the said A B, in token of her release of all right of dower in the granted premises, have hereunto set our hands and seals, this —— day of ——, in the year, etc.

Signed, sealed, and delivered
in presence of A B. [SEAL.]
E F. [SEAL.]

—— ss. —— 18 .

Then personally appeared the above-named A B, and acknowledged the foregoing instrument to be his free act.

Before me, ——, Justice, etc.

Where, as in Massachusetts, a right of homestead exists in the land, the deed should contain a special release of the same by the wife.

[1] Shep. Touch, 74; Co. Lit. 6 *a*, 7 *a*; 1 Wood, Conv. 236, Powell's note.

the rules of construction applicable to them. A deed now, however, may be effective to all intents to pass a title, though not written in the order here indicated, or wanting, in fact, everything but the briefest possible expression of an intent to convey the land described, if it is signed, sealed, and delivered as the deed of the party making it. And it is accordingly stated by Lord Coke, that if a deed of feoffment is without premises, *habendum*, *tenendum*, *reddendum*, clause of warranty, date, etc., it is good; for if one by deed give lands to another and to his heirs without saying anything more, and put his seal to the deed, and deliver it, and make livery where necessary, it is good.[1] And Judge Kent gives a form, which he thinks would be good all over the United States, which is quite as brief.[2]

§ 2267. **Sundry Clauses usual in Deeds.** — But though such a thing is possible, few are willing to take a bare, naked title, without some covenant of assurance, that, if it fails, they shall be indemnified for what they thereby lose; and comparatively few deeds are made in which there are not either recitals, exceptions, conditions, or reservations, as well as covenants respecting the title. While, therefore, courts are, as is said by Hobart, *astuti* in finding out some mode by which the intentions of parties in making deeds should not be defeated from mere defect in form, it is always safer, in a matter of so grave importance, to have a proper regard for the forms, as well as the phraseology, which have become settled by long-continued use, as well as adjudicated cases.[3]

§ 2268. **The Tenendum**, which limits and defines the tenure by which the lands are to be held, and once an important clause in the deed, is useless in this country, and practically so in England, since the statute of *quia emptores*.[4]

§ 2269. **The Premises.** — This part of the deed embraces all that precedes the words "to have and to hold," or, in other words, all before the *habendum*, including, therefore, the parties, the consideration, whatever recitals it may be proper to

[1] Co. Lit. 7 *a*; 1 Wood, Conv. 236, 237, and Powell's note; Shep. Touch. 75; Moore, Abst. 3.

[2] 4 Kent, Com. 461.

[3] Roe d. Wilkinson *v.* Tranmarr, Willes, 682, 684. See Maine, Anc. Law, 276.

[4] 1 Wood, Conv. 227; Shep. Touch. 52, and note.

insert by the way of explanation, the description of property granted, with such exceptions out of the same as the parties intend to make. Besides these, not only the words of grant, but usually the estate or quantity of ownership, are also mentioned in connection with the grant, though not given in the form inserted in the foregoing note, as such mention may be dispensed with, where it is followed by the *habendum*, whose purpose, as it will appear, it is to limit and define the estate or amount of interest or ownership in the land or property granted, and which it is intended to transfer to the grantee.[1]

§ 2270. **Defects in Premises supplied by other Parts.** — In the case of Berry *v.* Billings, while the court adopt the above definition of "premises" as applied to a deed, they hold, that though the premises do not contain the name of the grantee, nor the limitation of the estate intended to be granted, these may be supplied by the *habendum*, and the deed thereby be made good.[2] So where the premises, though they acknowledge the receipt of the consideration and the name of the intended grantee, contained no words of grant, but were followed by an *habendum* to J. B. in fee, with covenants of seisin, etc., to J. B., it was held to pass the estate described in the deed.[3] In one case, the grantor, by indenture, granted, bargained, and sold certain interests in real estate to another, without limiting the estate, and added a clause *binding* himself and heirs "to ratify and confirm" to the grantee and his heirs the subject of the grant. It was held that this clause did the office of an *habendum*, in limiting the estate granted.[4]

§ 2271. **Repugnancy between Premises and Habendum.** — Sometimes there is an apparent repugnancy between the granting part of the deed and the *habendum*, in respect to the estate which the grantee is to take in the property granted, which courts reconcile, if possible, so as to give effect to both; but, as will be seen when considering the *habendum*, if the language of the grant be definite in limiting the estate, and that of the

[1] Co. Lit. 6 *a*; Shep. Touch. 74.

[2] Berry *v.* Billings, 44 Me. 416, 423. See Sumner *v.* Williams, 8 Mass. 174; Budd *v.* Brooke, 3 Gill, 235.

[3] Bridge *v.* Wellington, 1 Mass. 219.

[4] Kenworthy *v.* Tullis, 3 Ind. 96.

habendum is clearly repugnant to the grant, the *habendum* yields to the terms of the grant.[1]

§ 2272. **Common Law Conveyances — Consideration.** — In the absence of fraud towards the grantor or his creditors, there does not seem to be any occasion to allege or prove any consideration in order to give effect to a deed of feoffment or any properly common law conveyance. Such a conveyance, properly consummated, operates to pass the title from the grantor to the grantee, which will be as effectual, if a voluntary gift, as if done for a valuable consideration.[2] Therefore a want or failure of consideration is no ground of avoidance of a deed.[3] Thus, where, in consideration of a promise to marry him, the grantor gave a deed of land, but died before the marriage took place, it did not affect the validity of the deed.[4] To bring a conveyance within the category of "voluntary conveyances," there must be a total want of any substantial consideration for the same; mere inadequacy of consideration would not be enough. In the one case, if the grantor is indebted at the time of making it, his creditors may avoid it; whereas, if it is only an inadequate consideration, the deed will not be void as to creditors, unless made with a fraudulent intent.[5] A deed made upon a *good* consideration only is a voluntary conveyance; but if made upon a consideration deemed *valuable* in law, it is of a different character.[6]

§ 2273. **Deeds under Statute of Uses — Consideration.** — But, for reasons heretofore explained, in order to give effect to deeds deriving their force and validity from the statute of uses, there must, as a general proposition, be a consideration, acknowledged or proved, such as would, before the statute, have raised a use in favor of the party intended to be bene-

[1] Farquharson *v.* Eichelberger, 15 Md. 63; Budd *v.* Brooke, 3 Gill, 236; 2 Lomax, Dig. 215.

[2] Den d. Springs *v.* Hanks, 5 Ired. 30, 32; Jackson *v.* Dillon, 2 Overt. 261, 264; Perry *v.* Price, 1 Mo. 553-555; Rogers *v.* Hillhouse, 3 Conn. 398, 402.

[3] Taylor *v.* King, 6 Munf. 358; Green *v.* Thomas, 11 Me. 318. See Thompson *v.* Thompson, 9 Ind. 331; Doe d. Abbott *v.* Hurd, 7 Blackf. 510; Winans *v.* Peebles, 31 Barb. 380; Boynton *v.* Rees, 8 Pick. 332; Pierson *v.* Armstrong, 1 Iowa, 282; Laberee *v.* Carleton, 53 Me. 212.

[4] Smith *v.* Allen, 5 Allen, 458.

[5] Washband *v.* Washband, 27 Conn. 424.

[6] Rockhill *v.* Spraggs, 9 Ind. 32.

fited, since it is by the union of the seisin with this use by act of law that these deeds become operative.[1] But a deed, "in consideration of lawful money well and truly paid," etc., was held to convey a good title, although no use is declared; since, though it do not state the number of pounds paid, it acknowledges the payment of value.[2] The application of this doctrine, with greater or less stringency in different States, has given rise to a direct conflict, in some instances, in the decisions of the courts upon substantially the same state of facts. But it may be stated as the prevailing doctrine, *first*, that to sustain a deed of bargain and sale requires a pecuniary or valuable consideration; *second*, except in Massachusetts, to sustain a deed of covenant to stand seised requires a good consideration, using that term in its technical sense, as denoting the regard which is supposed to arise from consanguinity or marriage between the parties; *third*, that if no consideration is expressed in the deed, whatever the consideration was, may be proved *aliunde;* and if one consideration be expressed, any other not inconsistent with or repugnant to the one expressed may be proved in a similar manner; and, *fourth*, that although it is always competent to control the fact stated in the deed as to the amount or thing paid, in a question involving the recovery of the purchase-money, or as a measure of damages in an action upon the covenants in the deed, it is not competent to contradict the acknowledgment of a consideration paid, in order to affect the validity of the deed, in creating or passing a title to the estate thereby granted.[3] A few cases, it is believed, will establish the doctrines here stated, although some of them will be found inconsistent with each other in other respects.

§ 2274. **Doctrine in New York and Maryland.** — In New York, before the system now prevailing was adopted, it was held that a pecuniary consideration was essential to give validity to a

[1] Den d. Springs *v.* Hanks, 5 Ired. 30; Jackson *v.* Dillon, 2 Overt. 264, 265. How far the acknowledgment of consideration in a deed is taken as evidence of its having been paid, see Galland *v.* Jackman, 26 Cal. 86.

[2] Wortman *v.* Ayles, 1 Hannay (N. B.), 65.

[3] Kinnebrew *v.* Kinnebrew, 35 Ala. 636; Webb *v.* Webb, 29 Ala. 606; Goodspeed *v.* Fuller, 46 Me. 141; Connor *v.* Follansbee, 59 N. H. 424; Trafton *v.* Hawes, 102 Mass. 533.

deed of bargain and sale, and that a deed could not be sustained where the only consideration was that the grantee was to do certain things therein recited, one of which was to pay money, but did not bind himself to their performance by executing the deed himself.[1] A similar doctrine is sustained in Maryland, that the consideration for bargain and sale must be a pecuniary one, or expressed in such general terms that a money consideration may be averred.[2]

§ 2275. **Valuable Consideration sufficient.** — But the better doctrine seems to be, that any valuable consideration, a *quid pro quo*, acknowledged or proved, will be sufficient to sustain a deed of bargain and sale.[3] Thus, in Jackson *v.* Pike, the consideration was the benefit to the grantor's other lands, to result from the use to be made of that conveyed to the grantee.[4] In another case, the conveyance was stated to be made "for value received."[5] In another, for "a certain sum in hand paid," but no amount mentioned.[6] In yet another, while a consideration was necessary, and was stated to be "—— dollars," it was held that the grantee might supply the blank by proof.[7] In one case, a covenant to render services was held a sufficient consideration for a deed.[8] In Pennsylvania, in a case where no consideration was expressed in the deed, the grantee was allowed to make it good by proof *aliunde*.[9] It is also laid down, in the case of Boardman *v.* Dean, that a deed of bargain and sale differs from that of gift or release, and that "the payment of the consideration was necessary to transfer the use and make the instrument operative." But though the language is broad enough to admit evidence,

[1] Jackson d. Allen *v.* Florence, 16 Johns. 47; Jackson d. Houseman *v.* Sebring, id. 528; Jackson d. Howell *v.* Delancey, 4 Cow. 427; Jackson d. Saunders *v.* Cadwell, 1 Cow. 622; Corwin *v.* Corwin, 9 Barb. 219.

[2] Cheney *v.* Watkins, 1 Harr. & J. 527, 532. So in Pennsylvania, Okison *v.* Patterson, 1 Watts & S. 395.

[3] Den d. Springs *v.* Hanks, 5 Ired. 30; Jackson d. Hopkins *v.* Leek, 19 Wend. 339, 341.

[4] Jackson d. Garnsey *v.* Pike, 9 Cow. 69.

[5] Jackson d. Hudson *v.* Alexander, 3 Johns. 492, 494.

[6] Jackson d. Hardenberg *v.* Schoonmaker, 2 Johns. 230; Shep. Touch. 223.

[7] Wood *v.* Beach, 7 Vt. 522, 528.

[8] Young *v.* Ringo, 1 Mon. 30, 32.

[9] White *v.* Weeks, 1 Penn. 486.

as was done in that case, to avoid the deed for the non-payment of the consideration, the circumstances of the case were so peculiar, that it can hardly be a guiding authority in other cases.[1] And in Alabama it was held, that, if one consideration was expressed, any other not inconsistent with that might be proved.[2] In Missouri, it is regarded as doubtful whether it is necessary to allege or prove any consideration to sustain a deed of bargain and sale; while it is clear, that, if none is expressed, one may be proved. Indeed, in Tennessee, under the operation of their statute, it has been held that the acknowledgment of a consideration in a deed is a mere ceremony, and not essential to its validity.[3] In Illinois, by a properly drawn deed, the title, whatever it is, will pass to the grantee without reference to the consideration paid.[4] No one but a creditor of the grantor in a deed can object to the want of consideration for the deed. The acknowledgment of consideration is sufficient *prima facie* evidence of its having been paid.[5]

§ 2276. **Same Subject.** — In Connecticut, a quitclaim deed "for divers good causes and considerations" is good; and, being a conveyance at common law, would be good without any consideration.[6] A deed was held good in Maine, where the consideration was a condition subsequent to support a third person, a stranger to the deed.[7] In New Hampshire and Massachusetts, a general indebtedness, or a liability of the grantee as surety for the grantor, was held a sufficient consideration for an absolute deed.[8] But in New Hampshire the only consideration which will support a covenant to stand seised is blood relationship or marriage.[9]

§ 2277. **Bargain and Sale operating as Feoffment.** — A deed intended as one of bargain and sale may nevertheless operate as

[1] Boardman *v.* Dean, 34 Penn. St. 252.

[2] Toulmin *v.* Austin, 5 Stew. & P. 410.

[3] Perry *v.* Price, 1 Mo. 553-555; Jackson *v.* Dillon, 2 Overt. 261, 264.

[4] Fetrow *v.* Merriwether, 53 Ill. 278.

[5] Hatch *v.* Bates, 54 Me. 142.

[6] Rogers *v.* Hillhouse, 3 Conn. 398, 402.

[7] Green *v.* Thomas, 11 Me. 320.

[8] Buffum *v.* Green, 5 N. H. 71; Bissell *v.* Strong, 9 Pick. 562; McWhorter *v.* Wright, 5 Ga. 555. But see Den d. Jackson *v.* Hampton, 8 Ired. 457.

[9] Rollins *v.* Riley, 44 N. H. 11.

a feoffment, if it contain among its operative words "give and grant," and is accompanied by a livery of seisin proved or presumed.[1] So a deed of "gift" may be good without consideration, being, in effect, a deed of feoffment.[2]

§ 2278. **Covenant to stand Seised — Consideration.** — From the doctrine mentioned by many of the courts, where no statute has been made upon the subject, that no estate of freehold *in futuro*, other than by way of remainder, could be created or conveyed by a deed of bargain and sale, but that this could be done by one of covenant to stand seised,[3] rules differing widely in their stringency have been applied by different courts in construing what relationship will constitute a *good* consideration sufficient to sustain a covenant to stand seised. In Jackson d. Houseman *v.* Sebring it was held, that no use could be raised in favor of any one not connected with the grantor by blood or marriage, so as to sustain a deed of covenant to stand seised, even though the grant were in trust for the benefit of one thus connected.[4] So, in Green *v.* Thomas, it was assumed by the court that blood or marriage alone would sustain a covenant to stand seised.[5] In Cheney *v.* Watkins, the requisite consideration is said to be "natural love and affection."[6] But in Jackson d. Howell *v.* Delancey, the rule is more positively stated, and as given in that case, as well as in Jackson d. Howell *v.* Cadwell, will be found to be directly at variance with the rule as recognized in Massachusetts in more than one particular. Thus the former case holds, that a consideration of blood or marriage is requisite; and that if one consideration, like money, be expressed, another, like consanguinity or marriage, may not be shown. In the latter, the deed was to the grantor's daughter-in-law

[1] Cheney *v.* Watkins, 1 Harr. & J. 527, 532.

[2] Den d. Springs *v.* Hanks, 5 Ired. 30, 31.

[3] Jackson d. Howell *v.* Delancey, 4 Cow. 427; Welsh *v.* Foster, 12 Mass. 93, 96; Marden *v.* Chase, 32 Me. 329; Brewer *v.* Hardy, 22 Pick. 376, 380; Wallis *v.* Wallis, 4 Mass. 135; Barrett *v.* French, 1 Conn. 354. See Bell *v.* Scammon, 15 N. H. 381, that it may be done by either form of conveyance. In Vermont, a freehold *in futuro* may, by statute, be expressly granted. Gorham *v.* Daniels, 23 Vt. 600.

[4] Jackson d. Houseman *v.* Sebring, 16 Johns. 528, 535.

[5] Green *v.* Thomas, 11 Me. 321.

[6] Cheney *v.* Watkins, 1 Harr. & J. 527, 532.

till her son was of age, the remainder to her son, the grantor's grandson; and the deed was held void, because there was neither a pecuniary consideration, nor such a relationship with the daughter-in-law as to sustain the deed as a covenant to stand seised.[1]

§ 2279. **Same Subject.** — In Massachusetts, on the contrary, it has been held, that where the consideration in a deed was stated to be $400, but the deed could not take effect as a common law conveyance, because the estate was to be had and held after the death of the grantor, and it appeared in evidence that the grantor was father to the grantee, the court held, that it was a good deed of covenant to stand seised, and the consideration of natural affection might be averred, notwithstanding the pecuniary one stated in the deed.[2] In the case of Gale *v.* Coburn,[3] where the consideration in the deed was $3,000, it was held that the deed could not take effect as a feoffment, or a bargain and sale, because of its being, in terms, a conveyance of a freehold *in futuro;* but that it might be a covenant to stand seised, although the only relationship between the grantor and grantee was that the latter had married the daughter of the former, by whom he had children then living, but who were not mentioned in the deed, and the wife had died many years previously. In the later case of Trafton *v.* Hawes,[4] the court fully discusses the question whether a deed of covenant to stand seised is valid where there is no relationship of blood or marriage between the parties, and the only consideration is a pecuniary one, and holds that such a deed is valid, as the reasons existing in England for

[1] Jackson d. Howell *v.* Delaucey, 4 Cow. 427; Corwin *v.* Corwin, 9 Barb. 219; Jackson d. Saunders *v.* Cadwell, 1 Cow. 622. But in M'Crea *v.* Purmort, 16 Wend. 460, the principle, that, where one consideration is expressed, another may not be proved, was entirely and distinctly overruled, and unlimited latitude of inquiry into the consideration of deeds allowed. Frink *v.* Green, 5 Barb. 455, 457; Rockhill *v.* Spraggs, 9 Ind. 30; Andrews *v.* Andrews, 12 Ind. 349; Lewis *v.* Brewster, 57 Penn. St. 410.

[2] Wallis *v.* Wallis, 4 Mass. 135; Brewer *v.* Hardy, 22 Pick. 380; Parker *v.* Nichols, 7 Pick. 111. See Potter *v.* Everitt, 7 Ired. Eq. 152.

[3] Gale *v.* Coburn, 18 Pick. 397; and see Welsh *v.* Foster, 12 Mass. 93; Den d. Springs *v.* Hanks, 5 Ired. 31; Bell *v.* Scammon, 15 N. H. 381; Marden *v.* Chase, 32 Me. 329, 332. See Bryan *v.* Bradley, 16 Conn. 474.

[4] 102 Mass. 533.

distinguishing between a bargain and sale and a covenant to stand seised do not exist in the United States.

§ 2280. **Covenant to Stand seised — Consideration — Prevailing Doctrine.** — Although considerable has already been said upon whether an estate of freehold, to commence *in futuro*, can be created by a deed of bargain and sale,[1] and any attempt to reconcile the decisions bearing upon that point may be ineffectual, yet the reasoning of Walworth, Ch., in Rogers *v.* Eagle Fire Ins. Co.,[2] in which he maintains the affirmative of the proposition, and the authorities upon which he rests, would seem to leave little doubt in the matter beyond what arises from the circumstance, that other courts have taken a different view of the law. He cites, in support of this general position, 4 Kent, Com. 298; Burt. Real Prop. § 145; Jackson *v.* Swart, 20 Johns. 87; and Cornish, Purch. Deeds, 35. And to these may be added, besides the authorities cited, *ante*, 2 Bl. Com. 166, Archbold's note; 2 Prest. Conv. 157, whose language is, "A bargain and sale, or covenant to stand seised to uses, will be free from objection, although it is to give an estate of freehold to commence at a future day, or upon an event," etc.; and Davis *v.* Speed,[3] where Holt, J., says: "The first use may be a springing use; for if I bargain and sell to the use of another five years hence, this is a good future use." This subject has undergone a searching and discriminating examination by the court of Maine, who fully sustain the doctrine, that a freehold *in futuro* may be conveyed by a deed under the statutes of that State.[4] The position that a freehold *in futuro* may be created by a deed of bargain and sale is sustained by the court of New Hampshire, confirming the reasoning in Rogers *v.* Eagle Fire. Ins. Co.[5] A deed cannot be defeated by a failure on the part of the purchaser to pay or perform the consideration agreed on.[6] And Wood, in his

[1] *Ante*, § 1370.

[2] Rogers *v.* Eagle Fire Ins. Co., 9 Wend. 611, 626–631.

[3] Davis *v.* Speed, 12 Mod. 39.

[4] Wyman *v.* Brown, 50 Me. 150; Jordan *v.* Stevens, 51 Me. 79; Drown *v.* Smith, 52 Me. 141.

[5] Bell *v.* Scammon, 15 N. H. 394.

[6] Lake *v.* Gray, 35 Iowa, 462. Thus, a conveyance upon the consideration of a promise of marriage would be supported although the marriage never took place.

Institutes,[1] in speaking of this mode of conveyance, says: "On the bargain and sale of lands no use may be declared but what the law doth make; viz., to the use of the bargainee." "A covenant to stand seised to uses may be to the use of a stranger; but then it must be for money, or other valuable consideration."

§ 2281. **Of contradicting the Acknowledgment of Consideration paid.** — The consideration stated and acknowledged in a deed is presumed to be the true value agreed to be paid, until the contrary is proved.[2] Therefore a deed executed by the party in whom the title is vested, expressing a consideration received, need never be supported by additional evidence as against him, or those claiming under him.[3] Or, in other words, between grantee and grantor, in the absence of fraud, in a controversy for title, there is no question open in relation to the nature or existence of the consideration.[4] But the amount named is only *prima facie* evidence of what was paid; and the true consideration may be shown, though it differ from that in the deed.[5] It is competent to prove by parol what the real consideration agreed to be paid was, and to show that the same, or some part of it, remains unpaid, though not thereby to impeach the title conveyed by the deed.[6] But in North Carolina, the acknowledgment of payment of a consideration in a deed is held to be conclusive, and not open to be contradicted or controlled by parol evidence.[7] The vendor may

Smith *v.* Allen, 5 Allen, 454; s. c. 81 Am. Dec. 758; Prignon *v.* Daussat, 4 Wash. 199; s. c. 29 Pac. Rep. 1046.

[1] Wood, Inst. p. 266.

[2] Clements *v.* Landrum, 26 Ga. 401; Belden *v.* Seymour, 8 Conn. 310.

[3] Rockwell *v.* Brown, 54 N. Y. 213.

[4] Trafton *v.* Hawes, 102 Mass. 541.

[5] Lawton *v.* Buckingham, 15 Iowa, 22; Morris Canal, etc. Co. *v.* Ryerson, 27 N. J. L. 467; Rabsuhl *v.* Lack, 35 Mo. 316; Drury *v.* Tremont Imp. Co., 13 Allen, 171; Paige *v.* Sherman, 6 Gray, 511; Miller *v.* Goodwin, 8 Gray, 542; Pierce *v.* Brew, 43 Vt. 295; Harper *v.* Perry, 28 Iowa, 63; Parker *v.* Foy, 43 Miss. 260.

[6] Wilkinson *v.* Scott, 17 Mass. 257; Kumler *v.* Ferguson, 7 Minn. 442; Irvine *v.* McKeon, 23 Cal. 475; Coles *v.* Soulsby, 21 Cal. 47; Bullard *v.* Briggs, 7 Pick. 537; Rhine *v.* Allen, 36 Cal. 362; Callaway *v.* Hearn, 1 Houst. 610; Kimball *v.* Walker, 30 Ill. 511; Basford *v.* Pearson, 9 Allen, 392; Nutting *v.* Dickinson, 8 Allen, 540.

[7] Brocket *v.* Foscue, 1 Hawks, 64; Mendenhall *v.* Parish, 8 Jones, L. 106; Lowe *v.* Weatherley, 4 Dev. & B. 212.

recover, if the purchaser, on demand made for the deed, refuses to deliver it, or puts it out of his power to do so by conveying the land to a third person.[1] And assumpsit may lie to recover back a part of the consideration paid, and the receipt thereof is acknowledged by the deed of land, where there is a parol agreement of the parties, at the time of delivering the deed, to repay a part, if there is a deficiency in the quantity of the land sold and paid for.[2]

§ 2282. **Oral Promise controlled by Statute of Frauds.** — But the promise to pay, in order to be good within the statute of frauds, must be to be performed within one year, where it is merely oral.[3] And this power to prove a different consideration from the one in the deed is subject to the restrictions created by the statute of frauds. Thus, where one made a deed acknowledging the receipt of a valuable consideration, he was not allowed to show that the consideration was an agreement on the part of the grantee to convey the premises to a third party, since such an agreement, not being in writing, came within the statute of frauds.[4]

§ 2283. **Contradiction of Consideration not allowed to impeach the Deed.** — It is not competent to prove that no consideration has been paid, where one has been acknowledged in the deed, for the purpose of impeaching the validity of the deed, unless it is for the purpose of establishing fraud against the grantor. The true doctrine is stated in Grout *v.* Townsend, that where a deed acknowledges the receipt of a consideration, the grantor and all claiming under him are estopped from denying that one was paid, for the purpose of destroying the effect and operation of the deed, although they may disprove the payment for the purpose of recovering the consideration money.[5] The design

[1] Bassett *v.* Bassett, 55 Me. 127, 130; Goodspeed *v.* Fuller, 46 Me. 141; Murdock *v.* Gilchrist, 52 N. Y. 246.

[2] Murdock *v.* Gilchrist, 52 N. Y. 242.

[3] Marcy *v.* Marcy, 9 Allen, 8.

[4] Griswold *v.* Messenger, 6 Pick. 519.

[5] Grout *v.* Townsend, 2 Hill, 554, 557; M'Crea *v.* Purmort, 16 Wend. 460; Barnum *v.* Childs, 1 Sandf. 58, 62; Meriam *v.* Harsen, 2 Barb. Ch. 232, 267; Bank of the U. S. *v.* Housman, 6 Paige, Ch. 526; Doe d. Godfrey *v.* Beardsley, 2 McLean, C. C. 412, 414; Harvey *v.* Alexander, 1 Rand. 219; Goodwin *v.* Gilbert, 9 Mass. 510; Winans *v.* Peebles, 31 Barb. 371, 380; Farrington *v.* Barr, 36 N. H. 86; Graves *v.* Graves, 29 N. H. 129; Philbrook *v.* Delano, 29 Me. 410;

of the clause acknowledging payment of consideration is not to fix the precise amount paid, "but to prevent a resulting trust in the grantee."[1] It cannot be contradicted or varied by parol, so as in any way to affect the purpose of the deed; that is, its operation as a conveyance.[2] In Rockhill *v.* Spraggs, in a deed from father to son, in which a consideration of $300 was acknowledged, the court permitted the other heirs of the father, after his decease, to show that this was by way of advancement, and that no valuable consideration was paid. But this, it should be stated, did not avoid the deed.[3] So it is competent, in Indiana, to show that a deed is voluntary, although it recites a consideration, in order to bring it under the provisions of the statute, which provides that a voluntary gift of land reverts to the donor on the decease of the donee, childless and intestate.[4]

§ 2284. **Inserting Consideration prevents resulting Use.** — One of the purposes of inserting the acknowledgment of a valuable consideration in a deed is to prevent the resulting of any use or trust to the grantor, as was explained in a former part of this work.[5]

§ 2285. **The Words of Grant.** — Another part of the premises of a deed consists of the operative words of grant or conveyance. In the form given, these are, "give, bargain, sell, and convey," which cover almost any form of conveyance, whether at common law, or under the statute of uses. Nor does the use of the wrong tense, as "has given and granted," instead of "do," or "does give and grant," make any difference: either would be sufficient.[6] So where the grant was to A and his heirs, provided if A die in his minority without issue, then the property "to go" to the issue of B, it was held to be sufficient to convey

Wilt *v.* Franklin, 1 Binn. 502, 518. But see Boardman *v.* Dean, 34 Penn. St. 252. It seems that, in England, one is estopped to claim the purchase-money by suit against his acknowledgment in the deed that it has been paid. Baker *v.* Dewey, 1 Barn. & C. 704.

[1] Meeker *v.* Meeker, 16 Conn. 383, 387; Kimball *v.* Walker, 30 Ill. 511; Sprigg *v.* Mt. Pleasant Bank, 14 Pet. 206; Stackpole *v.* Robbins, 47 Barb. 219.

[2] Beach *v.* Packard, 10 Vt. 96, 100. See Grout *v.* Townsend, 2 Denio, 336; Hurn *v.* Soper, 6 Harr. & J. 276 Shep. Touch. 223.

[3] Rockhill *v.* Spraggs, 9 Ind. 30.

[4] Kenney *v.* Phillips, 91 Ind. 511.

[5] *Ante*, § 1395.

[6] Pierson *v.* Armstrong, 1 Iowa, 292.

it to such issue as a remainder.[1] And, as has been before said, such a deed, duly recorded, is regarded in several States as equivalent to a feoffment with livery of seisin.[2] The elementary writers insist upon the importance of the words of grant being suitable to the nature of the deed; and it is accordingly stated, that, for a feoffment, the proper words are "give," "grant," "enfeoff," etc.; and for bargain and sale, "grant, bargain, and sell," etc.[3] But the words "bargain and sell" are not essential to such a conveyance: any words of equivalent signification which would, at common law, raise a use, will be sufficient if they show the intent of the parties.[4] Thus a deed, though in terms a covenant to stand seised, if indented and enrolled, and its consideration was a pecuniary one, would be a good deed of bargain and sale.[5] But it is essential to a valid deed that it should contain words which show clearly an intent to grant the maker's interest or estate in the premises in question; and where the only words in the deed indicating such intent were "sign over," it was held to be inoperative as a grant.[6]

§ 2286. **Operative Words in Lease and Release.** — The usual operative words in a deed of lease and release are "grant, bargain, and sell," which give effect to the *lease*, and for this a peppercorn is a sufficient consideration; while the words "grant, bargain, sell, remise, release, and forever quitclaim," give effect to the *release;* though, if it were regarded as a simple release, the words "remise," "release," and "quitclaim" would be the proper and sufficient words. In all these forms, it will be observed the word "grant," which seems to be a generic term, is made use of. And what the author cited remarks is fully sustained by multiplied cases, — that, if it is clear that it is the intent of the maker of the deed that the estate should pass thereby, it will, if possible, be so construed as to effect this, although it want formal words, if there be any word in the deed sufficient to convey the estate.[7] The word "grant"

[1] Folk *v.* Varn, 9 Rich. Eq. 303, 310.

[2] Chalker *v.* Chalker, 1 Conn. 79, 89.

[3] 1 Wood, Conv. 203.

[4] 2 Wood, Conv. 15.

[5] 1 Wood, Conv. 203; 2 id. 15; Shep. Touch. 222.

[6] McKinney *v.* Settles, 31 Mo. 541.

[7] 1 Wood, Conv. 203, and Powell's note; 2 Rolle, Abr. 789, pl. 30; Shep. Touch. 82, 222, and Prest. note; Lynch *v.* Livingston, 8 Barb. 463, 485; Shove

is sometimes omitted intentionally in deeds, from its being, in some cases, construed by the common law into a general warranty.[1]

§ 2287. **Deeds take Effect according to Intent.** — "The law," says Mr. Powell in his notes to Wood's Conveyancing, "is curious, and almost subtilizes to devise reasons and means to make assurances and deeds enure according to the just intent of parties, and to avoid wrong and injury, which, by abiding by rigid rules, may be wrought out of innocent acts."[2] Thus where a grantor, for love and affection, granted to his two sons-in-law, B and C, a certain estate, and signed and sealed the deed, and then added below, "N. B. D., half to be for the use of M. C., half for the use of N.," but did not sign this, though the attestation of the witnesses was made below it, and then there was added an acknowledgment of the receipt of one dollar consideration, which was signed by the grantor without annexing any seal, it was held to create a trust in favor of M. and N. in equal shares.[3] In the text of the work above cited, reference is made to Adams *v.* Steer, where, in a deed of a reversion, the only words of conveyance were, "aliened, bargained, and sold;" and the word "grant" was not found in the deed, nor was the deed enrolled so as to operate as a bargain and sale. But it was held that the reversion would pass by force of the word "alien."[4] Words of release, moreover, may avail as a grant or a covenant to stand seised.[5] But a mere naked release to one not in possession of, or having a vested interest in, the premises, would be void.[6] But though in the form of a release, if there are sufficient words, it may operate as a grant in order to make it good.[7]

v. Pincke, 5 T. R. 124; Roe d. Wilkinson *v.* Tranmer, 2 Wils. 75, 78; Clanrickard *v.* Sidney, Hob. 277; Marden *v.* Chase, 32 Me. 329; Young *v.* Ringo, 1 Monr. 30, 32; Cornish, Purch. Deeds, 29. The word "grant" is not necessary in making a grant, if the intention to make it be manifest by the deed.

[1] 1 Wood, Conv. 203.

[2] 1 Wood, Conv. 206, note.

[3] Ivory *v.* Burns, 56 Penn. St. 300.

[4] Adams *v.* Steer, Cro. Jac. 210; Shep. Touch. Prest. ed. 91; Pierce *v.* Armstrong, 1 Iowa, 292.

[5] Shep. Touch. Prest. ed. 91; Roe d. Wilkinson *v.* Tranmer, 2 Wils. 75.

[6] Branham *v.* San José, 24 Cal. 606; Bennett *v.* Irwin, 3 Johns. 366.

[7] Goodtitle *v.* Bailey, Cowp. 601.

§ 2288. **The Words of Limitation.** — It is common to define, by the granting words in the premises of a deed, the estate thereby intended to be created, by adding in connection therewith proper terms of limitation, as to C D "and his heirs," and the like. At common law, words of grant to a man, without words of limitation or inheritance, were understood to create in him a life-estate, and the word "heirs" was indispensable to create an estate of inheritance. But this has been altered by statute in several of the States.[1] And a grant to one is effectual to pass it to his "assigns," though the term is not used in the deed.[2]

§ 2289. **Description of the Thing granted.** — This is, of course a most important part of the deed, as its purpose is to identify that upon which the other clauses of the deed are designed to operate; and if the subject of the grant cannot be ascertained by its description, the grant becomes void from the necessity of the case.[3] It is not, however, necessary that the deed should, in terms, convey the land or thing intended to be granted, if such grant is implied from what is described. Thus a grant of the rents, issues, and profits of a tract of land is the grant of the land itself. If the grant be of the uses of and dominion over land, it carries the land itself.[4]

§ 2290. **Power of Courts to reform.** — By statute now, courts are authorized to reform deeds, where, by mistake, the words of a deed are made to convey other estate than the parties intended, even though the mistake consists in the legal effect of the words used, while the words themselves were such as the scrivener intended to make use of. Thus, where a grant of an estate was made, excepting the widow's right of dower, it was held to be competent for the grantor to show that the exception was of the land set to the widow, and not, as the effect of the words of the deed implied, the widow's life-estate only in the land.[5] In one case, the court reformed a deed where the grantor had fraudulently erased a covenant in re-

[1] *Ante*, § 86.

[2] Metcalfe *v.* Westaway, 17 C. B. N. S. 667.

[3] 1 Wood, Conv. 206; Wofford *v.* McKinna, 23 Tex. 44.

[4] Co. Lit. 46; Caldwell *v.* Fulton, 31 Pa. St. 484; Clement *v.* Youngman, 40 Pa. St. 344; Keene's App., 64 Pa. St. 274.

[5] Canedy *v.* Marcy, 13 Gray, 373.

spect to the quantity of land.[1] And the court will reform a deed so as to correct a mistake in the point of compass stated in it, whether it be between the parties to the deed and their heirs, or any one purchasing with notice of the mistake. But if any intermediate owner of the estate had taken it without notice, he would have a right to stand upon the title as it appeared upon the deed; and if one purchase of another who had himself purchased without notice, he would have the rights of his vendor, though cognizant himself of the mistake.[2] Courts have reformed an absolute deed into a mortgage, the condition having been accidentally omitted.[3] In another case, a spring of water not having been excepted, by mistake, in a grant of land, as it should have been, the court compelled the grantee to quitclaim the use of it to his grantor.[4] [In another case a mortgage described less land than was intended. There was a foreclosure and sale. The mistake was carried through all of the proceedings. After thirty-two years the mortgage and all of the foreclosure proceedings were reformed.[5]] But it is only when material stipulations are erroneously framed, or wholly omitted by accident, mistake, or fraud, that equity will reform instruments, and make them conform to the original intention and agreement of the parties. If, therefore, an important reservation is omitted in a deed by consent of the parties, the grantee agreeing orally that the grantor should have the thing reserved, the court will not reform the deed by inserting the requisite clause.[6]

§ 2291. **What Mistake justifies Reformation.** — The doctrine of the reformation of deeds which have by mistake been wrongly drawn is essentially one of equitable jurisdiction, although it is in some States confirmed by statute. The mistake must be one of fact, not of law, except in cases of ignorance of title founded in mistake of a plain and settled principle of law, and in cases of imposition, misrepresentation, undue

[1] Metcalf *v.* Putnam, 9 Allen, 97.

[2] Prescott *v.* Hawkins, 16 N. H. 122, 127. See Gray *v.* Hornbeck, 31 Mo. 400.

[3] Adams *v.* Stevens, 49 Me. 362.

[4] Brown *v.* Lamphear, 35 Vt. 260; Story, Eq. Redf. ed. § 138.

[5] Greeley *v.* DeCottes, 24 Fla. 475; s. c. 5 So. Rep. 239.

[6] Andrew *v.* Spurr, 8 Allen, 416; Story, Eq. § 154; Mills *v.* Lockwood, 42 Ill. 111; White *v.* White, L. R. 15 Eq. Cas. 247.

influence, misplaced confidence, and surprise. If the deed is drawn under a mistake, or ignorance of a material fact, the mistake may be remedied in equity. The proof of a mistake must be plain and clear, but it may be by parol, although its effect is to vary a written instrument; nor is such proof obnoxious to the statute of frauds.[1]

§ 2292. **Rules governing Reformation of Deeds.** — It would seem, that, in New York, the court would allow the defendant, in an action of ejectment, to show, by way of defence, such mistake in the deed under which claim is made to the premises as would authorize a court of equity to reform the deed, without first having had a judgment for such a reform pronounced.[2] But in Massachusetts, it would seem to be necessary, in order to take advantage of such mistake in the trial of an issue depending upon the terms of a deed, that a decree for reforming the same should have been rendered. And in the hearing of a bill for reforming a deed, "and make it conform to a variant oral agreement, the proofs must be full, clear, and decisive, free from doubt or uncertainty;" and that, if the fact of the mistake is submitted to a jury, the proof of it "must be made beyond a reasonable doubt," — such a degree of proof as a jury would act upon in the most important affairs of life.[3] In New York, the courts reformed the language of a mortgage as to the terms of paying the instalments of the debt thereby secured, in favor of the mortgagor, against the assignee of the mortgage.[4] It is said generally in Pennsylvania, that mistakes of a scrivener may be proved by parol, and the deed reformed accordingly.[5] In an English case, upon a hearing upon a bill to reform a deed

[1] Story, Eq. Jur. §§ 111, 137, 140, 152, 153, 157, 158; Kelly *v.* Turner, 74 Ala. 513; Gardner *v.* Moore, 75 Ala. 394; Fuller *v.* Prov. Co. Sav. Bank, 14 R. I. 363; Davidson *v.* Davidson, 42 Ark. 362; Grayson *v.* Weddle, 80 Mo. 39; Skerrett *v.* Chille. Pros. Soc., 41 Ohio St. 606; Pence *v.* Armstrong, 95 Ind. 191; Finucan *v.* Kendig, 109 Ill. 198; Oswald *v.* Sproehale, 16 Ill. App. 368; Courtright *v.* Courtright, 63 Iowa, 356; Leal *v.* Terbush, 52 Mich. 100; Green Bay, etc. Co. *v.* Hewitt, 62 Wis. 316; Smith *v.* Butler, 11 Oreg. 46; Weed *v.* Weed, 94 N. Y. 243; Cummins *v.* Bulgin, 37 N. J. Eq. 476; Morris *v.* Penrose, 38 N. J. Eq. 629; Carver *v.* Lasallette, 57 Wis. 232.

[2] Cramer *v.* Benton, 60 Barb. 225.

[3] Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 317.

[4] Andrews *v.* Gillespie, 47 N. Y. 487.

[5] Huse *v.* Morris, 63 Penn. St. 372.

by substituting an entirety of the granted estate for the undivided half as described in the deed, the court ordered the deed itself to be altered accordingly, and held that a new deed was not necessary.[1] A mistake of law alone is not a ground for reforming a deed; but where a party is misled by the scrivener as to the effect of a certain form of expression made use of by him, and made to believe that it has the effect to carry out the agreement of the parties as they have stated it to him, and they sign it accordingly, and there is in this a mistake, the party injured thereby may have the deed reformed. But this excludes the case of a deed where there had been no previous settled agreement made until the deed was executed, and only covers cases where there has been an agreement of the parties distinct from the written agreement, and to which that may be made to conform.[2]

§ 2293. **The Object of the descriptive Part** of the grant is to define what the parties intend, the one to convey, the other to receive; and, with the use of proper care in this respect, there would be little occasion for rules of construction for this part of a deed; because *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.*[3] But it has been found necessary to resort to many rules for determining the legal meaning and intention of such parties, some of which may seem to be artificial, but, from general use, have been adopted as canons of construction.[4]

§ 2294. **Deed construed according to actual State of Premises.** — One of these rules is, that a deed is to be construed with reference to the actual, rightful state of the property at the time of its execution. The parties are supposed to refer to this for a definition of the terms made use of in their deed.[5]

[1] White *v.* White, L. R. 15 Eq. Cas. 247.

[2] Hutchings *v.* Huggins, 59 Ill. 32; Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 320. See also Canedy *v.* Marcy, 13 Gray, 373; Glass *v.* Hulbert, 102 Mass. 44; Wilcox *v.* Lucas, 121 Mass. 21.

[3] Broom's Maxims, 595; Hannum *v.* West Chester, 70 Penn. St. 372; Cole *v.* Lake Co., 54 N. H. 278.

[4] Walls *v.* Preston, 25 Cal. 65.

[5] Richardson *v.* Palmer, 38 N. H. 218; Dunklee *v.* Wilton R. R. Co., 24 N. H. 489; Stanley *v.* Green, 12 Cal. 148; Pollard *v.* Maddox, 28 Ala. 325, 326. See Commonwealth *v.* Roxbury, 9 Gray, 493, and note, 525; Adams *v.* Frothingham, 3 Mass. 352; Rider *v.* Thompson, 23 Me. 244; Hall *v.* Lund, 1 Hurlst. & C. 684,

Thus where one, owning land through which a stream of water flowed, changed the channel or course of the stream through his own land, and then sold it in separate parcels to different individuals, it was held that the purchasers took their estates in the condition they then were; and that if the old channel was within the land of one, and the new one within the land of the other, neither could restore the stream to its former channel against the consent of the other. And if the channel, as then used, became obstructed so as to flow the land of the other, the latter might enter and remove the obstruction, if necessary to prevent such overflowing.[1]

§ 2295. **Deed construed according to Situation of Parties.** — And one of the maxims resorted to by courts in construing deeds is, *contemporanea expositio est optima et fortissima in lege*.[2] In construing a deed, the court places itself, as nearly as possible, in the situation of the contracting parties; and their intent will be ascertained in the same manner as in the case of any other contract. If the intention is not then apparent from the deed, resort is to be had to the rules of construction, which give greater effect to those things about which the law presumes the parties are the least liable to make a mistake. But arbitrary rules are not to be invoked, if the intention of the parties can be plainly discovered without their aid.[3]

§ 2296. **Deed construed according to Subject-Matter.** — Grants are to be construed according to the subject-matter, and the natural presumptions arising from their terms, and thus render these an exposition of a rational intention. If the grant, for example, be to dig coals, it implies that the grantee is to have them; if to dig an aqueduct, he would have no right to the earth excavated.[4] Thus, where a grant was made of a right to draw water from *springs* in the grantor's land, but there were no springs in it, but there was water enough to supply the grant in a swamp upon the grantor's land, it was

per *Martin*, B.; Karmuller *v.* Krotz, 18 Iowa, 356; Lane *v.* Thompson, 43 N. H. 234; Abbott *v.* Abbott, 51 Me. 581.

[1] Roberts *v.* Roberts, 55 N. Y. 275.

[2] Connery *v.* Brooke, 73 Penn. St. 84; Brown's Max. 532.

[3] Kimball *v.* Semple, 25 Cal. 449.

[4] Lyman *v.* Arnold, 5 Mason, C. C. 198.

held that the grantee had a right, under this grant, to draw the requisite quantity from the swamp.[1] But in a subsequent case it was held, that a grant to take water from *springs* did not give the grantee a right to dig for water, because a "spring" is a place where the water, by natural force, usually issues from the ground; and water obtained by digging in the earth comes within the definition of a *well*, and not of a *spring*.[2]

§ 2297. **Construction for the Court; Application for the Jury.** — It is the duty of the court to construe a deed; but it is the duty of the jury to apply its terms, when thus construed, to the land in question, to ascertain whether the premises in question are within the description.[3] And where land was granted as being in M., but no State or county was mentioned, it would be presumed to be in the town of M., in the State in which the parties are, if there be a town of that name in the State.[4]

§ 2298. **Illustrations.** — One granted all the land which a certain "mill-dam flows;" and it was held to cover all the land it flowed when in use, and not to be limited to the particular state of water at the date of the deed; the stream, in fact, being then hardly above its banks.[5] On the other hand, a grant of "a mill-privilege," with the right to flow the water to a certain point, restricts the grantee from flowing it any higher, although such flowing would greatly benefit the privilege.[6] One conveyed an undivided half of an estate to A, and at a subsequent time conveyed the other undivided half to him, and took back a mortgage of "all the real estate" he had that day conveyed. It was held to be a mortgage of the entire land, the words "real estate" being used to describe the land, and not the interest in it which the mortgagee had conveyed by his deed.[7] The parties, in describing what was granted, used the word "farm;" and it was held not to be

[1] Day *v.* Adams, 42 Vt. 510.
[2] Magoon *v.* Harris, 46 Vt. 271.
[3] Bell *v.* Woodward, 46 N. H. 337.
[4] Harding *v.* Strong, 42 Ill. 148.
[5] Morse *v.* Marshall, 11 Allen, 230; s. c. 13 Allen, 288.
[6] Pray *v.* Great Falls Mg. Co., 38 N. H. 442.
[7] Carpenter *v.* Millard, 38 Vt. 9.

restricted to one distinct parcel, but to embrace "all such premises as have been let together," as used in the English sense; and it is used in a corresponding sense in America, in respect to premises used and occupied together.[1] In a case in Texas, where one granted another a hundred acres of land out of a larger tract, without describing it by metes and bounds, the court held that the grantee might select and locate his hundred acres in any part of this tract.[2] But the court of Illinois held a grant of thirty acres out of a larger parcel, but without giving any boundaries, void for uncertainty.[3] Where one owning lands in C., and also a right to enforce a condition subsequent by entry for condition broken, the condition not having yet been broken, mortgaged all his lands and all his right and claim to land in C., it was held not to carry this possibility of reversion.[4]

§ 2299. **Appurtenances pass with the Land.** — Where a thing is granted, all the means to attain it are also granted, and all its fruits and effects pass with the thing as appurtenant or belonging to it, though not specially named.[5] The maxim embodying this rule and its translation, as given by Broom, is, — *cuicunque aliquis quid concedit, concedere videtur, et id sine quo res ipsa esse non potuit*, — "Whoever grants a thing, is supposed also, tacitly, to grant that without which the grant itself would be of no effect."[6] And this is sometimes construed to carry land itself.[7] There are various illustrations of this proposition to be found in the cases which have been decided. Thus, if one grant a parcel of land which is surrounded by his other lands, he thereby grants a right to pass over his land to reach the parcel granted, if it is *necessary* in order to its enjoyment.[8] And the converse of the proposition is maintained, that if one sells land which surrounds his

[1] Bell *v.* Woodward, 46 N. H. 337.

[2] Wofford *v.* McKinna, 23 Tex. 45.

[3] Shackleford *v.* Bailey, 35 Ill. 391.

[4] Richardson *v.* Cambridge, 2 Allen, 118.

[5] Shep. Touch. 89; 4 Cruise, Dig. 265; Pomfret *v.* Ricroft, 1 Wms. Saund. 323; Broom, Max. 362.

[6] Liford's case, 11 Rep. 52; Broom, Max. 362.

[7] Sheets *v.* Selden, 2 Wall. 187.

[8] Shep. Touch. Prest. ed. 89, and note, 96; Broom, Max. 362; Pomfret *v.* Ricroft, 1 Wms. Saund. 323 a, note.

other land, and can only reach the latter by passing over that which he has granted, he will have a right thus to pass, though no right of way is reserved.[1]

§ 2300. **Of Appurtenant Easements passing.** — So the grant of land passes with it all *usual and accustomed* ways, as appurtenant easements, whether named or not. But, in order to pass as appurtenant, the way must, as a general proposition, be an *existing easement*, in the technical sense of this word; meaning thereby a right to use another's land for special and limited purposes, in connection with land for the use and enjoyment of which the right is exercised.[2] In one case, where a grantor had two parcels, A and B, and used a way over A to reach B, and then granted B "and appurtenances," it was held, that the way which had thus been used passed with the estate B.[3]

§ 2301. **What Rights pass as Appurtenant.** — So the grant of a mill carries the use of the water by which it is worked, the flood-gates, dam, and all things necessary for its use, as well as the soil and freehold of the land on which it stands, and that over which it projects; and such grant may embrace land adjoining it which is necessary for its use, and is actually used with the mill. It would include, also, a right to build and maintain a dam.[4] But, in respect to what would pass as privileges under such a grant, it would depend upon the circumstances and condition of the property at the time of the grant. If, therefore, the grant be of one of several mills, it will not be held constructively to pass so much as to destroy the other mills.[5] And though the grant of a mill passes the head of water by which it is carried, so far as it

[1] Brigham *v.* Smith, 4 Gray, 297; Broom, Max. 362; 3 Kent, Com. 422; Packer *v.* Welsted, 2 Sid. 39; Dutton *v.* Tayler, 2 Lutw. 1487; *ante*, § 1236; Washb. Ease. *32, and cases cited.

[2] Shep. Touch. 96; Broom, Max. 362; Leonard *v.* White, 7 Mass. 6; Jackson d. Yates *v.* Hathaway, 15 Johns. 447, 454; Harris *v.* Elliott, 10 Pet. 25, 54; Whalley *v.* Thompson, 1 Bos. & P. 371; Kent *v.* Waite, 10 Pick. 138; Murphy *v.* Campbell, 4 Penn. St. 484; Pickering *v.* Stapler, 5 S. & R. 107.

[3] Plant *v.* James, 5 Barn. & Ad. 791. For a full discussion of this question, see *ante*, § 1234, *et seq.*; *post*, § 2308.

[4] Thompson *v.* Banks, 43 N. H. 540; Richardson *v.* Bigelow, 15 Gray, 156; Prescott *v.* White, 21 Pick. 343.

[5] Hapgood *v.* Brown, 102 Mass. 453; Crittenden *v.* Field, 8 Gray, 621.

belongs to the grantor, and is, properly, appurtenant to the mill, it carries nothing beyond what the grantor owns, unless covered by the express words of the grant.[1] The adjacent land, in such case, does not pass as *appurtenant* to, but as *parcel* of, the principal thing granted.[2] The same rule applies in making a partition between tenants in common.[3] The grant of a "mill-site" or a "mill-privilege" carries the land itself, with the use of the water and appendages belonging to the mill; but it gives no right to use a reservoir when the grant is by metes and bounds, which do not include the reservoir.[4] But where the grant was to build a dam on the grantor's land, and flow his land to a certain extent, and the grantee built his dam below the grantor's land, and thereby flowed it to the defined extent, it was held he had a right so to do. He was not obliged to build on the grantor's land.[5] So if the grant be of land "on which a mill stood," or "a mill with appurtenances," it carries whatever is necessary for the mill; and the actual use by successive owners would be evidence of what this is. The necessity of the mill for its full and free enjoyment controls in the matter of what and how much shall pass as an incident, appurtenant to what is in terms granted, and might include a mill-yard and right of way.[6] So the grant of a house passes the land on which it stands.[7] And where one granted a building and the land on

[1] Bliss *v.* Kennedy, 43 Ill. 71; Rackley *v.* Sprague, 17 Me. 281; Wilcoxon *v.* McGhee, 12 Ill. 381.

[2] Shep. Touch. 89, 90; Allen *v.* Scott, 21 Pick. 25; Blake *v.* Clark, 6 Me. 436; Whitney *v.* Olney, 3 Mason, C. C. 280; Forbush *v.* Lombard, 13 Met. 109. See *post*, as to exception of a mill, or house, etc., out of a grant. Bardwell *v.* Ames, 22 Pick. 333, 358; Blaine *v.* Chambers, 1 S. & R. 169; Swartz *v.* Swartz, 4 Penn. St. 353, 359. See Murphy *v.* Campbell, 4 Penn. St. 480; Hathorn *v.* Stinson, 10 Me. 224; Atkins *v.* Bordman, 2 Met. 463; Rackley *v.* Sprague, 17 Me. 281; Washb. Ease. *34, *35; Thompson *v.* Banks, 43 N. H. 540.

[3] Munroe *v.* Stickney, 48 Me. 458. See Seavey *v.* Jones, 43 N. H. 441, as to the effect of a deed by one tenant in common of an undivided half of certain land, "with the mill," etc. It passed only an undivided half of the mill, etc.

[4] Moore *v.* Fletcher, 16 Me. 63; Crosby *v.* Bradbury, 20 Me. 61; Jackson d. Hasbrouck *v.* Vermilyea, 6 Cow. 677; Washb. Ease. 35, 36; Brace *v.* Yale, 4 Allen, 393.

[5] Kilgore *v.* Hascall, 21 Mich. 502.

[6] Voorhies *v.* Burchard, 55 N. Y. 102.

[7] Shep. Touch. 90; Esty *v.* Currier, 98 Mass. 501; Allen *v.* Scott, 21 Pick. 25;

which it stood, it was held to carry a veranda in front of the building, the stairs upon the outside of it, and the stone foundations on which they rested, together with the land in front of the building to the centre of the highway;[1] and a grant of a dwelling-house, and "outbuildings belonging thereto," not only carries the land on which they stand, but includes a barn which was used with the house, with the land under it.[2] By the grant of a "ropewalk," such land of the grantor passes as is actually used with it.[3] So of ferry ways.[4] So the grant of "a well" carries the land itself which it occupies,[5] though the grantor reserves the right to use the pump therein. The term "house," or "cottage," or "wharf," or "town pound," when granted and used as a general term of description, carries the land which is thereby occupied. Such would be the case with the grant of a "pool," or a "pit:" it would pass the land as well as the water in it.[6] But the grant of springs, or the use of springs, would ordinarily convey only a right to take the water of the same by aqueducts, and would not carry the soil and freehold.[7]

§ 2302. **Same Subject.** — If a man grants to another a right to dig a trench in his land, and lay a pipe for conveying water, he thereby grants a right to enter, dig, and repair the same;[8] but if he grant a right to dig a canal through his premises, it does not pass a right of property in the rocks or soil excavated, unless they may be used in constructing the canal.[9] So if he grants a piece of land to build a mill-dam upon, with a right to build such dam and maintain it for a water-privilege, of a certain height, he thereby grants the right, if necessary, to place a part of this dam upon his adjacent land.[10] The

Bacon *v.* Bowdoin, 2 Met. 598; Webster *v.* Potter, 105 Mass. 414; Rogers *v.* Snow, 118 Mass. 127.

[1] Gear *v.* Barnum, 37 Conn. 229.

[2] Woodman *v.* Smith, 53 Me. 81.

[3] Davis *v.* Handy, 73 N. H. 65.

[4] Gerrish *v.* Gary, 120 Mass. 132.

[5] Mixer *v.* Reed, 25 Vt. 254.

[6] Johnson *v.* Rayner, 6 Gray, 107; Shep. Touch. 94; Whitney *v.* Olney, 3 Mason, C. C. 282; Wooley *v.* Groton, 2 Cush. 305; Co. Lit. 5.

[7] Owen *v.* Field, 102 Mass. 104.

[8] Shep. Touch. 96; Broom, Max. 364; Pickering *v.* Stapler, 5 S. & R. 110.

[9] Washb. Ease. 42, 3d ed.

[10] Dryden *v.* Jepherson, 18 Pick. 385, 390; Swartz *v.* Swartz, 4 Penn. St. 353.

grant or reservation of "a way," or "a road," embraces only an easement, but not the soil, although the boundaries of the same are given. And the same rule would apply to any grant of a non-continuous right to, or use of, a thing.[1] But where the exception was of "all and so much and such parts as have been taken for public roads," it was held to exclude from the grant all the land within the highways which would remain the property of the grantor, subject to the easement which the public have over it.[2]

§ 2303. **Same Subject.** — So, if one grants the mines in his land, he grants thereby the right to dig for and work them.[3] So where a grantor excepted out of his grant of the land all coal-mines, with sufficient *way leave* and *stay leave* to and from the mines, and the right of sinking pits, it was held, that, as incident to the liberty to sink pits, the right to fix such machinery as would be necessary to drain the mines, and draw coal from the pits, was reserved; and that a pond to supply the engine and an engine-house, being essential accessories to such engine, were lawfully constructed by the grantor upon the premises.[4] This case will serve to illustrate the extent to which courts are disposed to carry the doctrine of implied grants when it is necessary to carry any direct grant into effect. Another example is found in the case of a grant by one, through whose land a stream flowed, to an owner above, of a right to throw the washings of ore into the stream, and to deposit themselves on the grantor's meadow below. The consequence was, that, in time, the meadow became so raised, that the washings flowed off on to his adjoining pasture. But it was held that the right to do this passed as an incident to the principal grant.[5]

§ 2304. **Grant of Incident cannot carry Principal Thing.** — But while a grant of the principal passes the incident in the

[1] Graves *v.* Amoskeag Mg. Co., 44 N. H. 464; Leavitt *v.* Towle, 8 N. H. 97; Peck *v.* Smith, 1 Conn. 103; Jamaica Pond Aq. Corp. *v.* Chandler, 9 Allen, 164.

[2] Munn *v.* Worrall, 53 N. Y. 46.

[3] Shep. Touch. 96.

[4] Dand *v.* Kingscote, 6 Mees. & W. 174; Broom, Max. 365. See Bardwell *v.* Ames, 22 Pick. 333, 358; Green *v.* Putnam, 8 Cush. 21; Turner *v.* Reynolds, 23 Penn. St. 199.

[5] Bushnell *v.* Props. Salisbury Ore Bed, 31 Conn. 150.

manner above suggested, the converse of the proposition is not true. The maxim is, *accessorium non ducit sed sequitur suum principale.*[1] Thus the grant of a reversion carries a rent; but the grant of a rent does not carry the reversion.[2] So a grant of land carries all mines within it, if not previously granted; but the grant of a man's lead or iron mines, for instance, does not pass the land.[3]

§ 2305. **Constituents pass under general Grant.** — Another rule is, that, where the grant is a general one, whatever belongs to the thing granted, as a constituent part or element, passes thereby. Thus the grant of a house passes the doors, windows, locks, keys, window blinds, and the like, although, at the time of the grant, they may have been severed from the same for a temporary purpose, if they had previously been fitted and applied.[4] So the grant of a "sawmill," with privileges and appurtenances, passes the machinery used in it, and would include a mill-chain, *dogs* and *bars* therein, by which logs are drawn in and secured for sawing; and, generally, whatever things are fitted and prepared to be used with real estate, and have been applied thereto, pass with the realty to which they have thus become accessory.[5]

§ 2306. **Same Subject.** — So the grant of land carries houses, trees, and everything standing or growing upon the surface; and this would include trees blown down and lying upon the ground, except such as are cut into logs or hewed into timber,[6] with mines, quarries, and whatever is contained beneath the surface; though it is competent for the owner to convey his mines by a separate and distinct grant, so as to create one freehold in the soil, and another in the mines.[7] A deed, in

[1] Broom, Max. 368; Shep. Touch. 89; Worcester *v.* Green, 2 Pick. 425, 428.

[2] Shep. Touch. 89; Broom, Max. 370.

[3] Shep. Touch. 96.

[4] Shep. Touch. 90.

[5] Farrar *v.* Stackpole, 6 Me. 154.

[6] Brackett *v.* Goddard, 54 Me. 313; Cook *v.* Whiting, 16 Ill. 481.

[7] Mott *v.* Palmer, 1 N. Y. 564, 569; Goodrich *v.* Jones, 2 Hill, 142; Noble *v.* Bosworth, 19 Pick. 314; Shep. Touch. 90; *ante*, § 20; Terhune *v.* Elberson, 2 N. J. L. 726. But see Smith *v.* Johnston, 1 Penn. 471, as to growing corn not passing. But Kent holds, that growing crops do pass by a grant of the land, 4 Kent, Com. 468; and is sustained by authority, as well as by well-settled principles. Foote *v.* Colvin, 3 Johns. 216; Kittredge *v.* Woods, 3 N. H. 503; Chap-

the following terms, was held to pass an interest in the mines under the grantor's land, as distinguished from a right of easement in another's land; "also the full right, title, and privilege of digging and taking away stone-coal, to any extent the said (grantee) may think proper to do, or cause to be done, under any of the land now owned and occupied by the (grantor)." The *habendum* and covenants were as to "the aforesaid right to the stone-coal," and "the right of stone-coal hereby given;" and it was held, that the grantee might, by his deed, convey an undivided share of this coal to another.[1] The same is true of trees growing upon land.[2] The clause, therefore, often inserted in deeds, conveying the buildings standing upon the granted premises, can be of no avail, except as a part of the description of what is granted.[3] Upon the same principle, manure made upon a farm in the ordinary course of husbandry, and lying in heaps or manure-beds upon it, will pass by a grant of the farm, although susceptible of being easily removed and sold.[4]

§ 2307. **Of Gold and Silver Mines passing with Land.** — In respect to mines of gold and silver, there was, by the English as well as the Continental law, this peculiarity, — that they belonged to the crown, though found in the land of an individual proprietor.[5] In "the charter of the Colony of Massachusetts Bay," there is, in addition to the ordinary description of the lands granted, the clause, "and also all mines and minerals, as well royal mines of gold and silver as other mines and minerals whatsoever." It appears, from Chancellor Kent's Commentaries, that the statutes of New York assert the right of the State as sovereign over mines, to the extent of the English statutes. In a case decided by Mr. Justice Clayton

man *v.* Long, 10 Ind. 465; McIlvaine *v.* Harris, 20 Mo. 457; Turner *v.* Reynolds, 23 Penn. St. 199, mines.

[1] Caldwell *v.* Fulton, 31 Penn. St. 475. See Clement *v.* Youngman, 40 Penn. St. 346.

[2] Clap *v.* Draper, 4 Mass. 266.

[3] Crosby *v.* Parker, 4 Mass. 110.

[4] Daniels *v.* Pond, 21 Pick. 367, 371; Fay *v.* Muzzey, 13 Gray, 53; Goodrich *v.* Jones, 2 Hill, 142; Lewis *v.* Lyman, 22 Pick. 437, 442; Wetherbee *v.* Ellison, 19 Vt. 379; *ante*, § 23.

[5] Queen *v.* Northumberland, 1 Plowd. 310, 336; 2 Inst. 578.

of Georgia, which is found in a note to the same work,[1] it was held, that the mines contained in the public lands in Georgia passed with the lands to individuals upon a grant thereof, unless expressly excepted. And such is held to be the law in California; and it is further held in that State, that though the gold and silver mines belonged to the crown of Spain, and passed with the sovereignty and the soil to the government of Mexico, and subsequently by treaty to the United States, they were, in the hands of the latter government, mere incidents to the ownership of the soil itself; and when the territory became a State, the United States continued to hold the public lands as proprietors by the right of ownership, and their title to the mines accordingly passed with the lands when conveyed to individual purchasers.[2]

§ 2308. **Land cannot pass as Appurtenant.** — Although it is an undoubted proposition, that whatever is properly *appurtenant* to the principal thing granted passes with it, it is not always easy to apply the term so as to determine, in a given case, whether the thing under consideration is appurtenant or not. A thing appendant or appurtenant is defined to be "a thing used with and related to, or dependent upon, another thing *more worthy*, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant." It results, therefore, that land can never be appurtenant to other land, or pass with it, as belonging to it.[3] It was accordingly held, in the case of Leonard *v.* White, just cited, that where one granted a mill, with its appurtenances, it did not pass the soil of a way which had been long used for access to the mill, though a right to pass over it as a way would have passed thereby.[4]

§ 2309. **Of Land passing as Parcel though nominally appurtenant.** — But land or buildings may be so necessary to the use

[1] 3 Kent, Com. 378 and note.

[2] Moore *v.* Smaw, 17 Cal. 199, 222; Boggs *v.* Merced Mining Co., 14 Cal. 279, 375.

[3] Leonard *v.* White, 7 Mass. 6, 8; Harris *v.* Elliott, 10 Pet. 25, 54; Co. Lit. 121 *b*; Jackson d. Yates *v.* Hathaway, 15 Johns. 447, 454; Blaine *v.* Chambers, 1 S. & R. 169; Tyler *v.* Hammond, 11 Pick. 193; Ammidown *v.* Granite Bk., 8 Allen, 293; Riddle *v.* Littlefield, 53 N. H. 508. See Rivas *v.* Solary, 18 Fla. 122.

[4] Hoboken Land & Imp. Co. *v.* Kerrigan, 31 N. J. L. 16.

and enjoyment of that which is granted as to pass with it, where they are, in effect, *parcel* of the thing granted, necessary to its enjoyment, and intended to pass with it like the other parts or parcels, though termed appurtenant, and described accordingly. Thus a devise of a "paper-mill, together with all the machinery and appurtenances to said mill," was held to pass all the land under the mill, and necessary for the use of it, and commonly used with it, as *parcel* thereof, on the ground, that though land cannot be appurtenant to land, so as to pass by that form of expression, yet, where the intention is clearly expressed that land should pass under that name, the law will give effect to the grant.[1] But the grant of a certain parcel of land, with a description of the same, together with a mill-house, mill-dam, races, water courses, and other appurtenances, did not pass the soil and freehold of the land flowed by the mill-pond.[2] But a grant of a mill and dam with appurtenances carries an upper reservoir and dam half a mile distant, although the intervening land is not owned by the grantor.[3] But where the grant was of a mill-privilege in C., in the county of N., including all the land flowed by the dam mentioned, it was held to convey all the lands flowed by the dam, though a part lay in the county of P.[4] The same principle was applied in regard to land under a house and around it, under a devise of the house, the same having been used with it, and being convenient for its enjoyment.[5] So with land to the centre of a highway, where the parcel adjoining the highway is conveyed: it passes as *parcel*, and not as *appurtenant*.[6]

[1] Whitney *v.* Olney, 3 Mason, C. C. 280 ; Swartz *v.* Swartz, 4 Penn. St. 353 ; Archer *v.* Bennett, 1 Lev. 131 ; Bacon *v.* Bowdoin, 22 Pick. 401 ; Doane *v.* Broad St. Assoc., 6 Mass. 334 ; Case of a Private Road, 1 Ashm. 417 ; Greenwood *v.* Murdock, 9 Gray, 20 ; Johnson *v.* Rayner, 6 Gray, 110 ; Esty *v.* Baker, 48 Me. 495 ; Ammidown *v.* Granite Bk., 8 Allen, 292 ; Avon Mfg. Co. *v.* Andrews, 30 Conn. 476 ; Esty *v.* Currier, 98 Mass. 501 ; Doyle *v.* Lord, 64 N. Y. 432.

[2] Bartholomew *v.* Edwards, 1 Houst. 25.

[3] Baker *v.* Bessey, 73 Me. 472 ; Simmons *v.* Cloonan, 81 N. Y. 557.

[4] Merritt *v.* Morse, 108 Mass. 276.

[5] Eliot *v.* Carter, 12 Pick. 436 ; Murphy *v.* Campbell, 4 Penn. St. 480, case of a privy passing with a house. Ammidown *v.* Ball, 8 Allen, 293 ; Wilson *v.* Hunter, 14 Wis. 687 ; Gibson *v.* Brockway, 8 N. H. 465 ; Maddox *v.* Goddard, 15 Me. 218 ; Moore *v.* Fletcher, 16 Me. 66 ; Polden *v.* Bastard, 4 Best & S. 257.

[6] Webber *v.* East. R. R. Co., 2 Met. 147, 151. See also Doe d. Clements *v.* Collins, 2 T. R. 498 ; Allen *v.* Scott, 21 Pick. 25 ; Blake *v.* Clark, 6 Me. 436 ;

§ 2310. **The Term "Messuage"** is often used in describing what is intended to be conveyed, but seems to be very indefinite in its extent, in some cases including not only the dwelling-house, which always seems to be implied in the term, but whatever buildings are included within the curtilage around the house, and the curtilage itself, orchard, garden, etc., and even, in some cases, a farm, or a manor, when clearly intended to be described in that way; and the grant of a messuage or a house, and all lands thereunto appertaining, will pass all lands usually occupied therewith.[1]

§ 2311. **Punctuation not regarded.** — In construing deeds, no regard is had to punctuation, since no estate ought to depend upon the insertion or omission of a comma or semicolon; and although stops are sometimes used, they are not regarded in the construction or meaning of the instrument.[2]

§ 2312. **Deed construed against the Grantor.** — [If there is any ambiguity in the terms of a deed and it cannot be cleared away by the application of any other rule, then,] inasmuch as the fault is assumed to be in the grantor, if he has left the point doubtful, it will be construed most favorably for the grantee. The grantor shall not take advantage of a difficulty which he has himself created. But this rule, however, is the last which courts apply, and is never resorted to so long as a satisfactory result can be reached by other rules of analysis and construction.[3]

§ 2313. **Every Part given Effect, if possible.** — When, as above suggested, the parts of a description in a deed are found inconsistent with each other, the courts always give effect to every part of the deed, if it is possible, consistently with the

Smith *v.* Martin, 2 Wms. Saund. 400, 401, n.; Co. Lit. 121, 122; Codman *v.* Evans, 1 Allen, 443.

[1] Termes de la Ley, "Mease;" Shep. Touch. 94; Smith *v.* Martin, 2 Wms. Saund. 401, and note; Woodman *v.* Smith, 53 Me. 81.

[2] Wms. Real Prop. 161; Ewing *v.* Burnet, 11 Pet. 54; Doe d. Willis *v.* Martin, 4 T. R. 65; 3 Dane, Abr. 558.

[3] Worthington *v.* Hylyer, 4 Mass. 205; Marshall *v.* Niles, 8 Conn. 369; Carroll *v.* Norwood, 5 Harr. & J. 155, 163; Clough *v.* Bowman, 15 N. H. 504; Sanborn *v.* Clough, 40 N. H. 330; Vance *v.* Fore, 24 Cal. 446; Dodge *v.* Walley, 22 Cal. 228. As to reservations, the grant is to be construed against the grantor, so that the reservation may derogate as little as possible from the grant. Grubb *v.* Grubb, 101 Penn. St. 11.

rules of law. The rule of law is, that a deed must be so construed, if possible, that no part shall be rejected.[1]

§ 2314. **General obvious Intent governs.** — If this cannot be done, they then examine and see if there is enough of the consistent and intelligible portions of the same to give effect to the intention of the parties; and if so, they reject what is repugnant to the general intention of the deed, or to any obvious particular intention of the party.[2] Upon the principle above stated, if there are two descriptions in a deed of the land conveyed, and they do not coincide, the grantee is at liberty to elect that which is most favorable to him.[3]

§ 2315. **Which of Repugnant Clauses governs.** — But if there are two clauses in a deed, which are so repugnant as not to stand together, the first is held to prevail over the last. But, between an introductory clause and the granting clause, the latter determines what interest is intended to be granted.[4] And where an instrument is partly written and partly printed, and the written clause is repugnant to the printed one, the former governs;[5] but if the repugnancy of the parts be such as to render the intention of the parties unintelligible, it defeats the grant itself. It has accordingly been held, that when the description of the estate intended to be conveyed includes several particulars, *all* of which are necessary to ascertain it, no estate will pass except such as agrees with *every* particular of the description. But if the description is sufficient to ascertain the estate, although the estate cannot agree with all the particulars of the description, yet it will pass.[6]

§ 2316. **Uncertainty of Description vitiates Deed.** — If the estate cannot be ascertained by the description in the grant, the deed fails altogether. Thus, where the terms of the grant recited

[1] Watters *v.* Bredin, 70 Penn. St. 238; Waterman *v.* Andrews, 14 R. I. 589; Coleman *v.* Bush, 97 N. Y. 545.

[2] Presbrey *v.* Presbrey, 13 Allen, 283; Bent *v.* Rogers, 137 Mass. 192.

[3] Esty *v.* Baker, 50 Me. 331; Melvin *v.* Proprs. Locks, etc., 5 Met. 27.

[4] Webb *v.* Webb, 29 Ala. 606.

[5] McNear *v.* McComber, 18 Iowa, 17.

[6] 23 Am. Jur. 279–281, by Judge *Metcalf;* Broom, Max. 497, 498; Law *v.* Hempstead, 10 Conn. 23; Corbin *v.* Healy, 20 Pick. 514; Bass *v.* Mitchell, 22 Tex. 285, 294; Peck *v.* Mallams, 10 N. Y. 532; Bond *v.* Fay, 8 Allen, 212; Abbott *v.* Abbott, 53 Me. 360, 361; Doane *v.* Wilcutt, 16 Gray, 371; Schofield *v.* Lockwood, 35 Conn. 428; Wilkinson *v.* Davis, Freeman, Ch. 58.

that it was part of a certain patent bounded by other lands named, "and supposed to contain four hundred acres, whereof about one hundred acres were struck off to J. W.," — Now know ye, etc., "do grant, bargain, and sell the before-mentioned premises to the said J. W.," — it was held to be void for want of a sufficient description to show what premises were granted.[1] So where one granted a certain number of acres of land, and described it as now staked out, when, in fact, it never was staked out, it was held to be a void deed; for it was not competent to identify by parol what the grantor intended to convey, if there is nothing in the deed by which this can be done.[2]

§ 2317. "**Falsa demonstratio non nocet.**" — If the instrument defines with convenient certainty what is intended to pass by it, a subsequent erroneous addition will not vitiate it.[3] Thus an officer's deed, being of "all the right and title" of A to certain lands, "being a leasehold unexpired," when, in fact, he owned a fee, was held to pass the fee.[4] And a deed of all the interest of A in lot No. 7, which came to him from S. J., when, in fact, his title was from J. J., and not from S. J., it was held to pass all his interest in that lot.[5] Thus, if one grant all his lands in D. which he had of J. S., none other will pass, though he have other lands in D. So "my house and land in S. occupied by me" will not contain an adjoining one then in the occupancy of a tenant.[6] Nor would a grant of "my homestead, containing 200 acres of land, being the same now occupied by me," pass lots then in the occupation of tenants at will, though included in the two hundred acres. Nor will parol evidence be admitted in these cases to show that the grantor intended to convey these lots.[7] But if he describes

[1] Peek *v.* Mallams, 10 N. Y. 530. See Hill *v.* Mowry, 6 Gray, 551; McGuire *v.* Stevens, 42 Miss. 724; 18 Am. Law Reg. o. s. 484, 486; Boardman *v.* Reed, 6 Pet. 345; Fenwick *v.* Floyd, 1 Har. & G. 172; Thomas *v.* Turvey, id. 437; Deery *v.* Cray, 10 Wall. 270.

[2] Andrews *v.* Todd, 50 N. H. 565.

[3] Broom, Max. 490; Crosby *v.* Bradbury, 20 Me. 61, 67; Jackson d. Rogers *v.* Clark, 7 Johns. 223; Parker *v.* Kane, 22 How. 1; Parks *v.* Loomis, 6 Gray, 467; Morrow *v.* Willard, 30 Vt. 118; Spiller *v.* Scribner, 36 Vt. 246; Hibbard *v.* Hurlburt, 10 Vt. 173; Presbrey *v.* Presbrey, 13 Allen, 283.

[4] Dodge *v.* Walley, 22 Cal. 224.

[5] Hathaway *v.* Juneau, 15 Wis. 264.

[6] Brown *v.* Saltonstall, 3 Met. 423; Warren *v.* Cogswell, 10 Gray, 76.

[7] Shep. Touch 90.

the estate which he intends to convey as all his lands in D., called "The Grange," which he had of J. S., and he has an estate of that name in D., but did not have it of J. S., the estate will nevertheless pass, and the false part of the description will be rejected.[1] A case requiring a compliance with all the particulars in a description is that where a grant was made of all the lands of the grantor in B. and elsewhere in the county of S., in the tenure of J. D. Nothing would pass except lands in the county of S. and in the tenure of J. D.;[2] whereas, by a grant of all the grantor's lands in D., containing ten acres, when, in fact, the parcel that he owns there contains twenty, the whole parcel passes.[3]

§ 2318. **General controlled by particular Descriptions.** — Where the premises of a grant are special and express, they cannot be restrained or frustrated by a distinct clause in the deed; though it is otherwise where the premises are general and implied. Thus, if the description in the deed be general, and is followed by a reference to one that is particular, the latter limits and defines the terms of the grant.[4] This may be illustrated by the case of Smith *v.* Strong, where the deed professed to grant several tracts of land described by numbers "in the Boston Purchase," among which were mentioned lots 15 and 43; and to this description was added, "The foregoing being the same and all the lands lying in the county of B. which were devised to me by the will of A." The lots named as above, in fact, were situated north of the "Boston Purchase," but adjoining it. It was held that they passed by the deed; for the words of general description of the granted premises are controlled and rendered certain by the particular description of the two lots.[5]

§ 2319. **Illustrations.** — As the principle intended to be illustrated can be explained better by example than in any other form, the following cases have been selected from numerous others. In one or two this rule is stated.[6] If there is some

[1] Shep. Touch. 99.

[2] Shep. Touch. 99.

[3] Shep. Touch. 100.

[4] Barney *v.* Miller, 18 Iowa, 466.

[5] Smith *v.* Strong, 14 Pick. 128. See Whiting *v.* Dewey, 15 Pick. 428; Winn *v.* Cabot, 18 Pick. 553; Cutler *v.* Tufts, 3 Pick. 272. See Dana *v.* Middlesex Bank, 10 Met. 250; Howell *v.* Saule, 5 Mason, C. C. 410.

[6] Morrell *v.* Fisher, 4 Exch. 591, where numerous cases are cited and examined.

land wherein *all* the demonstrations are true, and some wherein part are false, they shall be "intended to pass only those lands wherein the circumstances are true." In this case, "all my leasehold, homestead, lands, and tenements at H., containing about 170 acres, held under M., and now in the occupation of F. B., as tenant to me," were devised; and the question was, if it carried a certain piece of six acres, which answered the foregoing description, except in not being in the occupation of F. B. It was held, that the last-mentioned piece did not pass. But if the devise had been, in express terms, of the six-acre parcel, though it stated it to be in the occupation of F. B., it would have carried the parcel, and the descriptive clause would have been rejected as *falsa demonstratio*. So where the deed conveyed all that messuage with the lands, etc., now or late in the occupation of B., which messuage, lands, etc., are called and known and described by the several names, and contain the several quantities by admeasurement following; then followed a particular description of sundry parcels, but it omitted three parcels which had always formed a part of the farm, and had been occupied by B.; it was held that these did not pass, not coming within the parcels particularly described.[1]

§ 2320. **Of parol Evidence to explain Deed.** — A deed is not to be held void for uncertainty, if, by any reasonable construction, it can be made available. Parol evidence cannot be admitted to contradict or control the language of a deed; but latent ambiguities may be explained by such evidence,[2] and the technical terms of art.[3] Facts existing at the time of the conveyance and prior thereto may be proved by parol evidence, with a view of establishing a particular line as being the one contemplated by the parties, when, by the terms of the deed, such line is left uncertain.[4]

§ 2321. **Illustrations.** — There was a grant of the "farm" in W., on which the grantor lived, "being lot No. 17 in the first

[1] Griffiths *v.* Penson, 1 Hurlst. & C. 862. See also Barton *v.* Dawes, 10 C. B. 261; Llewellyn *v.* Jersey, 11 Mees. & W. 183.

[2] Hall *v.* Davis, 36 N. H. 569; 1 Greenl. Ev. § 297.

[3] Eaton *v.* Smith, 20 Pick. 150.

[4] Crafts *v.* Hibbard, 4 Met. 452; Abbott *v.* Abbott, 51 Me. 582; Bond *v.* Fay, 12 Allen, 88; Stanley *v.* Green, 12 Cal. 162; Shore *v.* Wilson, 9 Cl. & Fin. 556; Hildebrand *v.* Fogle, 20 Ohio, 147; 1 Greenl. Ev. §§ 295, 298.

division of lands, containing one hundred acres with my dwelling-house standing thereon, bounding west on land of J. C., northerly by a pond, east of lot No. 18, south of lot No. 19, having a highway through it." Now, in fact, No. 17 had no house upon it, nor any road through it, and only a little part of it was clear or susceptible of cultivation, and was nearly worthless, and only answered to the description in that it was bounded by a pond. In fact, the grantor's house stood upon another lot, separated from No. 17 by No. 18 and a highway, and occupied by him as a farm; and the court held, that, as it was obviously the intent of the parties to convey the farm and dwelling-house, this specific reference to No. 17, as a description of it, was false, and must be rejected, and that the farm did pass.[1]

§ 2322. **Quantity not a controlling Factor.** — Sometimes the quantity of land conveyed is mentioned in the deed; but, independently of an express averment or covenant as to quantity, this is always regarded as a part of the description merely, and will be rejected if it be inconsistent with the actual area of the premises, if the same is indicated and ascertained by known monuments and boundaries. It aids, but ordinarily does not control, the description of the granted premises,[2] and is regarded as the least reliable, and the last to be resorted to, in determining the boundaries of the premises conveyed.[3] This was applied in the sale of lands by public commissioners; as, where the parcel sold was described by bounds as containing 174 acres, the whole passed, although ascertained to contain 214 acres.[4]

[1] Worthington *v.* Hylyer, 4 Mass. 196. See Bosworth *v.* Sturtevant, 2 Cush. 392, 399; Fancher *v.* De Montegre, 1 Head, 40; Lush *v.* Druse, 4 Wend. 313; Johnson *v.* Simpson, 36 N. H. 91; Parks *v.* Loomis, 6 Gray, 467, where a specific monument was excluded as being a *falsa demonstratio*. Melvin *v.* Props. Locks & C., 5 Met. 28.

[2] Mann *v.* Pearson, 2 Johns. 37, 41; Snow *v.* Chapman, 1 Root, 528; Powell *v.* Clark, 5 Mass. 355, 357; 1 U. S. Dig. "Boundaries," § 41; Commissioner *v.* Thompson, 4 McCord, 434; Benton *v.* Horsley, 71 Ga. 619; Jackson d. Staring *v.* Defendorf, 1 Caines' Rep. 493; Miller *v.* Bentley, 5 Sneed, 671; Hall *v.* Mayhew, 15 Md. 551; Wright *v.* Wright, 34 Ala. 194; Riddell *v.* Jackson, 14 La. An. 135; Stanley *v.* Green, 12 Cal. 148; Dalton *v.* Rust, 22 Tex. 133; Armstrong *v.* Brownfield, 32 Kan. 116; Llewellyn *v.* Jersey, 11 Mees. & W. 183.

[3] Ufford *v.* Wilkins, 33 Iowa, 113.

[4] Jennings *v.* Monks, 4 Met. (Ky.) 103.

§ 2323. **Courses and Distances.** — So the admeasurement of distances, and the direction of lines in reference to the points of compass mentioned in the deed, are often made a part of the description of the premises intended to be granted; and in some cases, where the lines are so short as to be evidently susceptible of entire accuracy in their admeasurement, and are defined in such a manner as to indicate an exercise of this accuracy in describing the premises, such description is regarded with great confidence as a means of ascertaining what is intended to be conveyed, and courses and distances can only be controlled by monuments.[1]

§ 2324. **Monuments and Boundaries preferred.** — But, ordinarily, surveys are so loosely made, instruments so liable to be out of order, and admeasurements, especially in rough or uneven land or forests, so liable to be inaccurate, that the courses and distances given in a deed are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries that are referred to in the deed as indicating and identifying the land.[2] But this rule does not hold good when the grantor's evident intention was that the courses and distances should govern. As between an angle and a course, if inconsistent, circumstances must show which is to be taken as correct.[3] But if courses and distances are given, but no monuments are given or called for in the deed, parol evidence is not competent to control these,[4] although the distance be described as so many feet "more or less" or the lot be described by a name, as the

[1] Chadbourn *v.* Mason, 48 Me. 391.

[2] Davis *v.* Rainsford, 17 Mass. 207, 210, where the distance given was but a few feet, and was given in feet and inches. Howe *v.* Bass, 2 Mass. 380; Frost *v.* Spaulding, 19 Pick. 445; M'Pherson *v.* Foster, 4 Wash. C. C. 45; 1 U. S. Dig. "Boundaries," § 15, where cases are collected; Lodge *v.* Barnett, 46 Penn. St. 484; Evansville *v.* Page, 23 Ind. 527; Harris *v.* Hull, 70 Ga. 831; Frost *v.* Angier, 127 Mass. 212; Brown *v.* Huger, 21 How. 305; Hall *v.* Davis, 36 N. H. 569; Miller *v.* Cherry, 3 Jones Eq. 29; Colton *v.* Seavey, 22 Cal. 496; Drew *v.* Swift, 46 N. Y. 207.

[3] Hall *v.* Eaton, 139 Mass. 217.

[4] Drew *v.* Swift, 46 N. Y. 209; Bagley *v.* Morrill, 46 Vt. 94, 100. And where a line runs so many rods to a stake or stone, and none can be found, it will be presumed that the stake stood at the end of this measurement. Wilson *v.* Hildreth, 118 Mass. 578.

Beasant Holly lot.[1] What constitutes a boundary in a deed is a fact for the jury, and may be proved by any kind of evidence which is competent to prove any fact.[2] Nor is it competent for a court of equity to fix boundaries to legal estates, unless some equity is superinduced by the act of the parties.[3] The course called for in the deed was "westerly;" but the monuments referred to carried it in a northwesterly course, and the latter was held to be the true line.[4] This doctrine was applied where the monument was the line of a third person's land: the true line of his land will control the courses named in the deed.[5] And bounding by another's land means along the line of such land.[6]

§ 2325. **What may be referred to to ascertain Boundaries.** — Among the things which may be referred to in determining questions of boundaries, are "actual occupation, ancient reputation, the admissions of the party in possession against his interest, ancient maps and draughts, marked trees, the lines of adjoining surveys, and monuments erected at or soon after the date of the grant of adjoining surveys." These are all admissible for this purpose, though they conflict with the courses and distances called for in the deed. The order of applying descriptions of boundaries is, *first*, to natural objects; *second*, to artificial marks; and *third*, to courses and distances given in the deed.[7] The following is an example of the application of this rule, viz.: A agreed to convey a lot of land in the city of New York, 120 feet deep from a street, "including the stable." The parties were mistaken as to the requisite admeasurement to include the stable, which was 131 feet. It was held that the deed must convey a sufficient depth to

[1] Blaney *v.* Rice, 20 Pick. 62; Cherry *v.* Slade, 3 Murph. 82; 1 U. S. Dig. "Boundaries," § 47; Welch *v.* Phillips, 1 McCord, 215; Duncan *v.* Madara, 106 Penn. St. 562; 4 Greenl. Cruise, Dig. 265, note; Flagg *v.* Thurston, 13 Pick. 145; Bloch *v.* Pfaff, 101 Mass. 538; Guilmartin *v.* Wood, 76 Ala. 204.

[2] Opdyke *v.* Stephens, 4 Dutch. 89; Brown *v.* Willey, 42 Penn. St. 209.

[3] Norris' App., 64 Penn. St. 279, 280.

[4] Colton *v.* Seavey, 22 Cal. 496.

[5] Park *v.* Pratt, 38 Vt. 552.

[6] Bailey *v.* White, 41 N. H. 343; Peaslee *v.* Gee, 19 N. H. 273.

[7] Bolton *v.* Lann, 16 Tex. 96; Fulwood *v.* Graham, 1 Rich. 497; Ferris *v.* Coover, 10 Cal. 629. See Ogden *v.* Porterfield, 34 Penn. St. 196; Beahan *v.* Stapleton, 13 Gray, 427.

include the stable.[1] Where the deed described a side line as "commencing on a way," extrinsic evidence was admitted to show that the parties at the time measured the line from the middle, not the side of the way, and established monuments and occupied accordingly.[2]

§ 2326. **Where only Three Sides are given.** — A deed is not to be held void for uncertainty because the boundaries are not fully expressed, when by reasonable intendment it can be ascertained what was considered and understood by both parties to be embraced, and intended to be embraced, in the description. The obvious and legal course, we think, is to lay down a plan on the land according to ascertained boundaries, abutments, and monuments, on these three sides, and thus see where the fourth would come. If it terminate on the sea or salt water, on a highway or public common, or on a well-established line of private property, such deficient line will be supplied by necessary intendment, and the instrument be read as if it were so expressed.[3]

§ 2327. **Where the Quantity is certain and only One Side given.** — So where a certain quantity of land is mentioned with a given side upon the river, without the courses being given, it was held that the tract should be laid out as nearly as might be in a rectangular form, in the direction indicated from the stream, the stream forming its base line, the two sides being parallel and drawn at right angles with the general course of the stream at that point, and to extend back far enough to include the requisite quantity. If the description does not require the side opposite to the stream to be parallel with the stream, that side is to be drawn at right angles with the sides of the tract, and parallel with the general direction of the stream.[4] So, where a line was to run from a certain point to a point on the side of a street *opposite* a certain monument upon the opposite side of the street, it was held that this point must be where a line drawn from the monument at right

[1] White *v.* Williams, 48 N. Y. 344.

[2] Dodd *v.* Witt, 139 Mass. 63.

[3] Commonwealth *v.* Roxbury, 9 Gray, 490. So when five boundaries were given, a sixth was supplied. Woodward *v.* Nims, 130 Mass. 70.

[4] Hicks *v.* Coleman, 25 Cal. 142, 143; Craig *v.* Hawkins, 1 Bibb, 54; Calk *v.* Stribling, id. 122; Van Gorden *v.* Jackson d. Bogardus, 5 Johns. 474.

angles with the street at that point would strike the opposite side of the street.[1]

§ 2328. **Grant of undivided Half.** — Where land is described by metes and bounds, and then one undivided half granted, only one undivided half is conveyed by the deed.[2]

§ 2329. **Meaning of Compass Terms.** — In respect to courses, if the deed calls for a line running "northerly," it is said that it is to be taken as meaning a line due north,[3] unless the monuments between which the line runs show a different direction.[4] But where the grant was of the "west half" of a lot, it was held to be open to explanation by the situation of the lot when conveyed, and the manner in which the parties then occupied it, although a north and south line would materially vary from the line as thus established.[5] All lines laid down in deeds as run by points of compass have reference to the magnetic meridian, even though "due" is used as "due north," etc. And this is the common law of New Hampshire.[6] So granting land, reserving all the wood on the premises "south of the meadow," includes all that lies to the south of a line extending along the meadow through the premises, and is not limited to the wood lying directly south of the meadow itself.[7]

§ 2330. **Lines, how run between Monuments.** — But the most reliable means of establishing what is intended to be conveyed in a deed are the monuments therein described and referred to as forming the boundaries of the estate. "Monuments must control courses and distances, even if it cause a wide departure from them."[8] It is a universal rule, that, where a line is given in a deed as running from one monument to another, it it always to be taken as straight, if not otherwise described.[9]

[1] Bradley *v.* Wilson, 58 Me. 360.

[2] Maxwell *v.* Hosmer, 138 Mass. 207.

[3] Brandt *v.* Ogden, 1 Johns. 158; Henshaw *v.* Mullins, 121 Mass. 143. See Jackson d. Clark *v.* Reeves, 3 Caines, 293; Van Gorden *v.* Jackson d. Bogardus, 5 Johns. 473; Bosworth *v.* Danzien, 25 Cal. 296.

[4] Garvin *v.* Dean, 115 Mass. 577.

[5] Schmitz *v.* Schmitz, 19 Wis. 210.

[6] Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 261.

[7] Cronin *v.* Richardson, 8 Allen, 423.

[8] Coburn *v.* Coxeter, 51 N. H. 158.

[9] Allen *v.* Kingsbury, 16 Pick. 235, 238; Baker *v.* Talbott, 6 Mon. 179;

If the line run from one point to another over another point, the same is to be run straight from the first to the intermediate point, and straight from that to the other point.[1] So that, by ascertaining the monuments at the angles of a parcel of land, the boundary-lines can at once be determined. So if, in the description of land, a line is called for, running from an ascertained point to some natural boundary, like a stream of water, without giving the point of compass or some known object by the stream, it is held to be a line running in the most direct and shortest course between the given point and the stream.[2]

§ 2331. **Ownership Lines as Monuments.** — Some of these monuments are natural objects, others are artificial, and one parcel of land itself may be a monument to determine the boundary and limit of another.[3] But in such case, the boundary is to be construed to be the true line of ownership, and not that of occupancy or enclosure, if the latter be other than by the true dividing line.[4] And such description excludes whatever has been already granted away, although the deed may not have been recorded.[5] If a parcel is bounded "by a house," the line is at the *eaves* of the house.[6]

§ 2332. **What Monuments must be in Existence when Deed is made.** — Among the natural objects which are often referred to as monuments in deeds, and which have been the subject of somewhat arbitrary rules, are streams and rivers, ponds, shores, beaches, highways, streets, and the like. These, of

McCoy *v.* Galloway, 3 Ohio, 283; Nelson *v.* Hall, 1 McLean, C. C. 519, in which blocks from trees marked as corners, and others marked as line trees, were produced to the jury, showing the annular growth of the trees. Burnett *v.* Thompson, 6 Jones (N. C.), 210; Caraway *v.* Chancy, id. 364; Jenks *v.* Morgan, 6 Gray, 448; Henehaw *v.* Mullins, 121 Mass. 143; Leonard *v.* Quinlan, id. 527.

[1] Hovey *v.* Sawyer, 5 Allen, 555.

[2] Caraway *v.* Chancy, *supra*.

[3] Flagg *v.* Thurston, 13 Pick. 150; Carroll *v.* Norwood, 4 Harr. & McH. 287; Smith *v.* Murphy, 1 Tayl. (N. C.) 303; Bates *v.* Tymason, 13 Wend. 300; Bloch *v.* Pfaff, 101 Mass. 538; Ake *v.* Mason, 101 Penn. St. 17. Abutting lands control courses and distances not actually marked off. So Younkin *v.* Cowan, 34 Penn. St. 198; Cox *v.* Couch, 8 Penn. St. 147.

[4] Northrop *v.* Sumney, 27 Barb. 196; Cornell *v.* Jackson, 9 Met. 154; Wiswell *v.* Marston, 54 Me. 270; Sparhawk *v.* Bagg, 16 Gray, 585; Cleaveland *v.* Flagg, 4 Cush. 76.

[5] Adams *v.* Cuddy, 13 Pick. 460; Chaffin *v.* Chaffin, 4 Gray, 280; Jamaica Pond Aq. Corp. *v.* Chandler, 9 Allen, 167.

[6] Carbrey *v.* Willis, 7 Allen, 370; Millett *v.* Fowle, 8 Cush. 150.

course, must exist, in the nature of things, at the time of making the deed, in order to serve as monuments. But artificial monuments may be referred to in a deed, which do not then exist, but which, if afterwards fixed and established by the parties to correspond with and answer to those described, become as effectual and conclusive upon the parties as if they had been in existence when the deed was executed.[1] The same principle has been applied where the line has been described as running a particular course from an established point; and if the parties have then run it out, located and marked it, and occupied to the line so marked, it is taken to be the true line, though varying from the course given in the deed, or other less certain boundaries than the line so marked.[2]

§ 2333. **Void Description validated by Location.** — Thus, to sell ten acres of land without describing any boundaries to the same would be void; but if the parties then go on and stake out that quantity of land, and the grantee takes possession of it, it ascertains the grant, and gives effect to the deed.[3] So where the grant was of a parcel of land running back from a street so many feet, more or less, and the grantor afterwards had a plan drawn, which he put on record, making the back line of the lot a larger number of feet from the street than that mentioned in the deed, it was held to be equivalent to fixing the bounds of the lot, and to govern in ascertaining what was intended to be granted.[4]

§ 2334. **Unnavigable Streams as Boundaries.** — In respect to streams and rivers which are not navigable, the rule seems to be universal, that describing land as running to the stream or the bank, and by it or along the stream or the bank, extends to the middle or thread of the stream, the *filum aquæ*, unless there is something in the description clearly excluding the intermediate space between the edge or bank of the stream and

[1] Waterman *v.* Johnson, 13 Pick. 261, 267; Makepeace *v.* Bancroft, 12 Mass. 469, 473; Blaney *v.* Rice, 20 Pick. 62; Leonard *v.* Quinlan, 121 Mass. 579; Lerned *v.* Morrill, 2 N. H. 197; Kennebec Purchase *v.* Tiffany, 1 Me. 219; Knowles *v.* Toothaker, 58 Me. 175.

[2] Kellogg *v.* Smith, 7 Cush. 382; Frost *v.* Spalding, 19 Pick. 445; Corning *v.* Troy Iron & N. Factory, 40 N. Y. 208; Rockwell *v.* Baldwin, 53 Ill. 22; Miles *v.* Barrows, 122 Mass. 579.

[3] Purinton *v.* No. Ill. R. R. Co., 46 Ill. 300; Cleaveland *v.* Flagg, 4 Cush. 81.

[4] Blaney *v.* Rice, 20 Pick. 64. See also Hathaway *v.* Evans, 108 Mass. 270.

its thread.[1] And if the bed of the stream changes imperceptibly by the gradual washing of the banks, the line of the land bordering upon it changes with it; but if this change is by reason of a freshet, and suddenly done, the line remains as it was originally.[2] Where the line ran "to the bank" of a stream, in which there was an ebb and flow of tide of fresh water, then by the bank, etc., it was held to be a boundary by the line of high-water mark.[3] But where the line ran "N. W. to the river, and thence N. E. by the river shore," it was held to convey to the middle of the stream.[4] Where the line began at a tree on the south side of a river, thence down the river as it meanders, it was held not to include the land *ad filum aquæ*.[5] Where the boundary was "up the bank" of a creek, it was held to carry only to low-water mark.[6] In Michigan, lands bounding upon her rivers extend to the *filum aquæ*, subject to the right in the public to use them as highways.[7] If one owning lands upon one or both sides of a river within which there are islands, and the same is not navigable, sells the land upon the side or sides of the river, excepting or reserving these islands, the line of division between the islands and the mainland is the *filum aquæ* of the river between the two;[8] and if islands form in such rivers, there are thereby two *fila aquæ* in the stream, one on each side of the island and the bank opposite to it.[9] This doctrine was applied

[1] The State *v.* Gilmanton, 9 N. H. 461; Hatch *v.* Dwight, 17 Mass. 289, 298, 299; Canal Fund Commrs. *v.* Kempshall, 26 Wend. 404; People *v.* Platt, 17 Johns. 195, 210; Hargr. Law Tracts, 5, 6; Morgan *v.* Reading, 3 Sm. & M. 366, 399, 404; People *v.* Canal Appraisers, 13 Wend. 355, 370; Morrison *v.* Keen, 3 Me. 474; Harramond *v.* M'Glaughon, 1 Tayl. 136, though the courses and distances given do not agree with the actual course of the stream; Browne *v.* Kennedy, 5 Harr. & J. 195, 205, 207. See Hammond *v.* Ridgely, 5 Harr. & J. 245, 274, 275; Arnold *v.* Elmore, 16 Wis. 514; Yates *v.* Judd, 18 Wis. 128; Gove *v.* White, 20 Wis. 432; Hayes *v.* Bowman, 1 Rand. 417.

[2] Lynch *v.* Allen, 4 Dev. & B. 62.

[3] Stone *v.* Augusta, 46 Me. 127.

[4] Sleeper *v.* Laconia, 60 N. H. 201.

[5] Holbert *v.* Edens, 5 Lea, 204.

[6] Murphy *v.* Copeland, 58 Iowa, 409.

[7] Lormon *v.* Benson, 8 Mich. 18.

[8] Stolp *v.* Hoyt, 44 Ill. 220. Under a deed conveying a hotel and the "lands adjoining it," a small island in a river at the rear of the hotel did not pass. Miller *v.* Mann, 55 Vt. 475.

[9] Hopkins Acad. *v.* Dickinson, 9 Cush. 549.

to land bordering upon a lake and its outlet, which lake was five miles in length, but less than a mile in width: the *filum aquæ* was held to be the boundary-line.[1] When a boundary-line of land runs up or down a stream, it follows its meanderings; and when the length of it is given, it is ascertained by reducing these meandering lines to a straight one.[2] * The rule as adopted

* Note. — The rulings of the court, in applying the general doctrine of the text, can best be illustrated by referring to the terms of the deeds which were the subjects of consideration. These may appear to be conflicting; but the question seems to turn upon the whole language as to the stream, which is the boundary, and not upon the fact that an object, mentioned as a corner bound, stands upon the bank. If the bank or shore be the intended line, the stream is excluded. If it be the stream, the *filum aquæ*, which is the line, any object mentioned upon the shore merely indicates the point at which the line strikes the bank in extending it to the thread of the stream. Thus, in one case, the line ran "to a stake standing on the east bank, etc., thence down the river, etc.," and was held to extend to the thread. Luce *v.* Carley, 24 Wend. 451. The case of Lunt *v.* Holland is, in most respects, like the last-mentioned case; the corners given were trees standing on the side of the river, the intermediate line "bounding by said river." 14 Mass. 150. In Newton *v.* Eddy, 23 Vt. 319, the boundary was described as "easterly on a creek, and down said creek to a small butternut tree, which is the northeast corner of said lot." It was held that the true corner was at the centre of the stream, opposite this tree. Robinson *v.* White, 42 Me. 218. The case of Cold Spring Iron Works *v.* Tolland, 9 Cush. 492, is the same in principle as the above, the corner being a tree on the river, but the land "bounding on said" river. The centre of the river was held to be the boundary-line. The following cases may be added upon the general point stated in the text: Newhall *v.* Ireson, 13 Gray, 262; Commonwealth *v.* Alger, 7 Cush. 97; Brown *v.* Chadbourne, 31 Me. 9. Among the cases illustrating the other part of the above proposition is Dunlap *v.* Stetson, 4 Mason, C. C. 349, where one corner was a stake, etc., on the west bank of the river, and then around to another stake on the same bank, "thence running on the western bank of said river to high water to the first bound." It excluded the river. Babcock *v.* Utter, 1 Abb. Dec. 27; Watson *v.* Peters, 26 Mich. 516, 517. So a line running to G. River, thence "along the shore of said river to," etc., was held to exclude the river. Child *v.* Starr, 4 Hill, 369. Bradford *v.* Cressey, 45 Me. 9, is the same in principle as the last-mentioned case: the line ran to strike the creek, then "on the west bank of said creek." The court in the latter case consider, at considerable length, the conflicting cases on this point, many of which are collected in the opinion there given, and sustain the distinction above stated, that where the party uses the term "bank, side, margin, or shore," they become themselves monuments, and are to be so treated. The case of Child *v.* Starr, as reported in 4 Hill, 369, overruled the decision in the same case in

[1] Ledyard *v.* Ten Eyck, 36 Barb. 125; Mill River W. Mfg. Co. *v.* Smith, 34 Conn. 462, though the mill-pond had existed 200 years; Paine *v.* Woods, 108 Mass. 168–172; Mansur *v.* Blake, 62 Me. 38.

[2] Hicks *v.* Coleman, 25 Cal. 142; Calk *v.* Stribling, 1 Bibb, 122.

in California as to measuring a boundary-line of land bordering upon a river is this: If a certain distance is called for from a given point on a navigable stream to another point on the stream, to be ascertained by such admeasurement, it is made by its meanders, and not in a straight line; and the same rule prevails when distance is called for upon a travelled highway. When a tract of land is bounded upon a navigable stream, the distance upon the stream will be ascertained, in the absence of other controlling facts, by measuring in a straight line from the opposite boundaries.[1] The operation of the same rule includes the parts of islands divided by the thread of the stream, extended as a line across them.[2] But though it is well settled, that, if an island forms in a river opposite to lands whose owner's property extends to the thread of the stream, it will belong to both, or to the one or the other, as its parts are divided by the

20 Wend. 149. The doctrine as to the "bank," when a monument, excluding the stream itself, was fully held in Daniels *v.* Cheshire R. R. Co., 20 N. H. 85, and in Halsey *v.* McCormick, 13 N. Y. 296, where it was held, that such a boundary carried the line to the low-water mark of the stream, if not otherwise limited. See also Child *v.* Starr, *supra*. For further authorities upon the general subject, see Ang. Waterc. §§ 24, 29; Varick *v.* Smith, 9 Paige, 547; Hathorn *v.* Stinson, 10 Me. 224. But the case of McCullock *v.* Aten, 2 Ohio, 307, seems to vary somewhat from either of the general propositions above made. There the boundary began "at a white oak on the southeast bank of G. Creek, thence down said creek with the several meanderings thereof," and was held to be the line of the water in the creek, and not the top of the bank. See Cox *v.* Freedley, 33 Penn. St. 129; *Ex parte* Jennings, 6 Cowen, 536. But in Tennessee, where her large rivers are deemed to be *navigable* streams by her courts, a line running to a tree on the bank of the C. River, thence down said river according to its several courses, so many rods, to "a sweet gum-tree," was held to run along the line of low-water mark of the river. Martin *v.* Nance, 3 Head, 650. "It may be considered a canon in American jurisprudence that where the calls in a conveyance of land are for two corners, at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise." St. Clair County *v.* Lovingston, 23 Wall. 46; Woodman *v.* Spencer, 54 N. H. 507, 23 Am. L. Reg. 411. The river, and not the meander line, in such cases, is the boundary of the lot. St. Paul & P. R. R. Co. *v.* Schurmeir, 7 Wall. 286.

[1] People *v.* Henderson, 40 Cal. 32.

[2] Ingraham *v.* Wilkinson, 4 Pick. 268; People *v.* Canal Appraisers, 13 Wend. 355, 370; Canal Commrs. *v.* People, 5 Wend. 423, 443; Ang. Waterc. §§ 44–47; 3 Kent, Com. 428; Schurmeier *v.* St. Paul & P. R. R. Co., 10 Minn. 82. For what is an island, see *ante*, § 1882.

thread of the stream extended across it, or otherwise; its existence leads, of course, to two separate and distinct threads, one to each branch of the stream; and these are, after such change, to be regarded each as a *filum aquæ* as to that part of the stream in relation to any new acquisition of titles bordering upon the same.[1] And the doctrine that the riparian owner of land is thereby the owner of the soil of the stream to its centre applies to the great rivers in this country, like the Mississippi, subject to the public easement of passing over the same in boats or river craft, and doing whatever is necessary to use it as a highway.[2] A boundary by the channel of a river means the thread of the channel.[3] If an island makes two channels, the larger is the boundary, if nothing indicates a contrary intent.[4]

§ 2335. **What are navigable Streams.** — Though it would be impossible to reconcile the rulings of the various courts in this country upon the question, What is a navigable stream? it may be useful to give the result of some of these, in order to see in what respect they differ. It seems to be conceded by all, that streams in which the tide ebbs and flows are what are known to the common law as *navigable;* and further, as will be stated hereafter, land bounding upon such streams extends only to the line of the high-water mark. But some of the courts regard the large rivers in this country above tide-water as navigable, and carry the line of land bounding upon them to *low*-water

[1] Hopkins Acad. *v.* Dickinson, 9 Cush. 544, 548. See also *ante*, § 1882.

[2] Ingraham *v.* Wilkinson, 4 Pick. 268, 271; Adams *v.* Pease, 2 Conn. 481; People *v.* Platt, 17 Johns. 195, 211; Hooker *v.* Cummings, 20 Johns. 90, 99; Middleton *v.* Pritchard, 4 Ill. 510, 521; Gavit *v.* Chambers, 3 Ohio, 495; Commonwealth *v.* Chapin, 5 Pick. 199; Morgan *v.* Reading, 3 Sm. & M. 366, 403; People *v.* Canal Appraisers, 13 Wend. 355, 371. In Palmer *v.* Mulligan, 3 Caines, 315, Thompson, J., held the Hudson a public river, subject to private ownership of its banks to its thread. In Brown *v.* Chadbourne, 31 Me. 9, the same doctrine is applied to smaller boatable rivers in Maine. See also Homochitto Riv. Commrs. *v.* Withers, 29 Miss. 29; Home *v.* Richards, 4 Call, 441. In Massachusetts, the doctrine is applied to the Connecticut and Merrimac above tide-water. Commonwealth *v.* Alger, 7 Cush. 53, 97, 101. *Contra*, Carson *v.* Blazer, 2 Binn. 475; Shrunk *v.* Schuylkill Nav. Co., 14 S. & R. 71; Bullock *v.* Wilson, 2 Port. 436; Haight *v.* Keokuk, 4 Iowa, 199, 212; McManus *v.* Carmichael, 3 Iowa, 1. See also O'Fallon *v.* Daggett, 4 Mo. 343; Canal Commrs. *v.* People, 5 Wend. 423, 443; Cates *v.* Wadlington, 1 McCord, 580; Blanchard *v.* Porter, 11 Ohio, 138. See 3 Kent, Com. 431, note; Claremont *v.* Carlton, 2 N. H. 369.

[3] Warren *v.* Thomaston, 75 Me. 329.

[4] Cessill *v.* State, 40 Ark. 501; Branham *v.* Turnpike Co., 1 Lea, 706.

mark. The subject is very ably and learnedly discussed by the court of Mississippi, who make what seems to be the true and proper distinction between *public* and *navigable* streams. They show that it does not depend upon the capacity for navigation by boats, or other craft, but is borrowed from the law of nations. By this, tidal waters are public highways for all nations, and therefore the State only can own or exercise control over them; whereas intra-territorial streams are subject to State jurisdiction as to being navigated; and it is competent for the State to grant the soil under these rivers, subject to a public use of the waters for purposes of travelling, and carrying on trade. In that way the ownership of the soil may be in the riparian proprietors, subject to the easement on the part of the public of passing in boats, rafts, etc., upon its waters. The court examine critically the decisions of the various courts, and come to the conclusion, that whoever owns lands bounding upon such streams owns the soil to the *filum aquæ*, subject to the right of navigating its waters by the public.[1] The large rivers in Pennsylvania are held to be navigable, and the bed of the stream belongs to the State. If land is bounded by such rivers, the line is that of low-water mark; but it is subject to the right in the public to pass over the space between high and low water marks in boats and for fishing. Islands in such rivers belong to the State. "Low water" means *ordinary* low water; so that if, at very low water, there is no flow between the bank and the supposed island, it would not make it a part of the mainland, if, at the ordinary state of the stream, the water flows between it and the bank.[2] The same rule applies in Indiana in respect to the Ohio River.[3] In Illinois, the Ohio is a navigable river and a public highway; but persons using it as such have no right to land on or make use of the shore above the line of low water. The owner of the land between high and low water may erect and maintain a wharf thereon, and charge any one for using it. The ownership of the bed of the stream to the *filum*

[1] Steamboat Magnolia *v.* Marshall, 39 Miss. 109–135. See Canal Appraisers *v.* People, 17 Wend. 595; Rhodes *v.* Otis, 33 Ala. 578, 596, 597.

[2] Stover *v.* Jack, 60 Penn. St. 339; Wood *v.* Appal, 63 Penn. St. 221, 224; Tinicum Fishing Co. *v.* Carter, 61 Penn. St. 21; Wainwright *v.* McCullough, 63 Penn. St. 66, which relates to the Alleghany River.

[3] Martin *v.* Evansville, 32 Ind. 85.

aquæ seems to be conceded to the riparian owner, but subject to the use of the river as a highway by the public.[1] In Kentucky, the riparian owner of lands bounding by the Ohio owns to the thread of the stream, subject to its being used as a highway.[2] In Michigan, if the bed of the stream belongs, as in case of navigable rivers, to the State, riparian owners may not extend wharves in front of their lands: otherwise, though the stream be a public way, they may erect such wharves, if they do not thereby unreasonably impede the passage of water-borne craft.[3] In Wisconsin, the court hold Rock River a navigable stream, and excepted, as such, from the mill laws; but they evidently do not give it the incidents of a navigable as distinguished from a public stream, inasmuch as they hold that the ownership of the soil under any of her rivers is not affected by its being declared navigable.[4]

§ 2336. **Navigable Rivers — Line of Riparian Ownership.** — The foregoing survey shows that the decisions in the various States are conflicting upon this point; but, to sum up, it may be stated that in the following States it is held that upon the large fresh-water streams which are in fact navigable the riparian ownership extends only to the water line, whether high or low is not always indicated, and that the public have an easement of way over the water, but the State owns the land below that mark, i. e., North Carolina, Alabama, Kentucky, Iowa, Kansas, Pennsylvania, Tennessee, Florida, Michigan, Arkansas, Oregon, Montana, and Delaware.[5] While in the following States, the common law rule prevails, and the riparian owner owns to the thread of the stream, unless the tide ebbs and

[1] Ensminger *v.* People, 47 Ill. 384–391.

[2] Berry *v.* Snyder, 3 Bush, 266.

[3] Ryan *v.* Brown, 18 Mich. 196.

[4] Wood *v.* Hustis, 17 Wis. 418; Cobb *v.* Smith, 16 Wis. 664.

[5] State *v.* Glen, 7 Jones (N. C.), 321, 325; Wilson *v.* Forbes, 2 Dev. 30; Bullock *v.* Wilson, 2 Port. 436; Thurman *v.* Morrison, 14 B. Mon. 367; Tomlin *v.* R. R. Co., 32 Iowa, 106; Barney *v.* Keokuk, 94 U. S. 324; Wood *v.* Fowler, 26 Kan. 689; Monong Br. Co. *v.* Kirk, 46 Penn. St. 112; Baily *v.* R. R. Co., 4 How. 389; Wood *v.* Appal, 63 Penn. St. 224; Martin *v.* Nance, 3 Head, 650; State *v.* Black River Phos. Co., 27 Fla. 276; s. c. 9 So. Rep. 205; La Plaisance Bay Harbor Co. *v.* Monroe, Walk. Ch. 158; Backus *v.* Detroit, 49 Mich. 110; Wallace *v.* Driver, 61 Ark. 429; s. c. 33 S. W. Rep. 641; Johnson *v.* Knott, 13 Oreg. 308; s. c. 10 Pac. Rep. 418; Gibson *v.* Kelly, 15 Mont. 417; s. c. 39 Pac. Rep. 517.

flows in it: Connecticut, Ohio, Missouri, Illinois, Massachusetts, Maryland, Wisconsin, South Carolina, Maine, Mississippi, Vermont, New Jersey, and New York, except as to the Mohawk and Hudson rivers.[1] By act of Congress, the boundary of public lands granted by the United States bordering on navigable streams is the bank of the stream, not the thread.[2] In Massachusetts, it is held that navigable waters extend as far as the water rises and falls, although the rise is rather fresh water pushed back by the incoming tide, than the salt water itself.[3]

§ 2337. **Fresh Water Ponds and Lakes as Boundaries.** — Where the boundary given is a natural pond or lake of fresh water, the boundary-line will, [in those States where the common law rule obtains, run to the centre of the lake, unless it be one of the great navigable lakes;[4] while in Massachusetts and the States which follow the American rule,] it will, it seems, run along the low-water mark of the pond,[5] though other cases speak only of the "water's edge."[6] But if the pond be an artificial one made by a dam across a running stream, and land is bounded upon it, the line will be the thread of the stream.[7] If the natural pond be raised above its natural

[1] Adams *v.* Pease, 2 Conn. 481; Stuart *v.* Clark, 2 Swan, 9; Holbert *v.* Edens, 5 Lea, 204; Gavit *v.* Chambers, 3 Ohio, 496; June *v.* Purcell, 36 Ohio St. 396; O'Fallon *v.* Daggett, 4 Mo. 343; Washington Ice Co. *v.* Shortall, 101 Ill. 46; Com. *v.* Chapin, 5 Pick. 199; Knight *v.* Wilder, 2 Cush. 209; Com. *v.* Vincent, 108 Mass. 441; Browne *v.* Kennedy, 5 H. & J. 195; Jones *v.* Pettibone, 2 Wis. 308; McCullough *v.* Wall, 4 Rich. 68; Browne *v.* Chadbourne, 31 Me. 9; The Magnolia *v.* Marshall, 39 Miss. 110; Atty.-Gen. *v.* Del., etc. R. R. Co., 27 N. J. Eq. 1; Miller *v.* Mann, 55 Vt. 475; Norway Plains Co. *v.* Bradley, 52 N. H. 86; Smith *v.* Rochester, 92 N. Y. 463.

[2] Railroad Co. *v.* Schurmeir, 7 Wall. 272.

[3] Atty.-Gen. *v.* Woods, 108 Mass. 431.

[4] Webber *v.* Pere Marquette B. Co., 62 Mich. 626; s. c. 30 N. W. Rep. 469; Smith *v.* Rochester, 92 N. Y. 463; Hardin *v.* Jordan, 140 U. S. 371.

[5] Waterman *v.* Johnson, 13 Pick. 261, 265; Stevens *v.* King, 76 Me. 197. See Nelson *v.* Butterfield, 21 Me. 229; W. Roxbury *v.* Stoddard, 7 Allen, 167; Canal Commrs. *v.* People, 5 Wend. 446, 447; Fletcher *v.* Phelps, 28 Vt. 257; Jakeway *v.* Barrett, 38 Vt. 323, in relation to Lake Champlain; Primm *v.* Walker, 38 Mo. 99.

[6] The State *v.* Gilmanton, 9 N. H. 461; Hathorn *v.* Stinson, 10 Me. 224, 238; Mansur *v.* Blake, 62 Me. 38.

[7] Bradley *v.* Rice, 13 Me. 198, 201; Waterman *v.* Johnson, 13 Pick. 261; Lowell *v.* Robinson, 16 Me. 357; Phinney *v.* Watts, 9 Gray, 269; Mansur *v.* Blake, *supra*, unless the land is bounded by "the bank," which excludes the water.

margin by an artificial dam at the time of making the deed, or be at that time drawn down by an artificial trench or channel, the line of the water in the then existing pond is the boundary; and unless there is something in the deed to negative the presumption, such boundary is the low-water mark, or line of the pond in its artificial extent, and is not confined to what happened to be the line of the water at the precise time when the deed was made.[1] In Hathorne *v.* Stinson, the court held that a grant exhibited upon a plan as being bounded by a natural pond which was then raised by a dam should be construed to include two acres subsequently left bare and susceptible of cultivation by removing the obstructions in the stream, so as still to bring the boundary to the pond as it was after such removal.[2] If the bound be by a great pond[3] or lake which is public property, it carries the land to the low-water mark; and this would be true if the pond be a natural one, though raised at times artificially by a dam at its outlet. The boundary in such cases would extend to the low-water mark of the pond in its natural state.[4] The above doctrine is sustained in New York, where it was held: 1st, converting a fresh-water pond into a salt one by an artificial channel between it and the sea does not change its character as a boundary; 2d, landowners bounding on natural ponds hold to low-water mark. If it be an artificial pond, they hold to the centre line of the pond; but if the boundary be by tide-water, though a stream, it extends only to high-water mark.[5] In Vermont it is held, that owners of land bounding on Lake Champlain have no title beyond low-water mark, and cannot, therefore, build out wharves into the lake beyond this line without a grant from the legislature.[6] In a peculiar case, however, in Massachusetts, where a large natural pond had been raised by an artificial dam

[1] Wood *v.* Kelley, 30 Me. 47, 54.

[2] Hathorne *v.* Stinson, 12 Me. 183.

[3] Great ponds contain ten or more acres. Mass. Colony Laws, 148.

[4] Paine *v.* Woods, 108 Mass. 170–172, in which Waterman *v.* Johnson and Bradley *v.* Rice, 13 Me. 198, are qualified and explained, and Wood *v.* Kelley, *supra*, approved; Boston *v.* Richardson, 13 Allen, 154.

[5] Wheeler *v.* Spinola, 54 N. Y. 377. It seems doubtful in England whether the soil of lakes belongs to the owners of the land on their sides or to the crown. Marshall *v.* Ulleswater Steam Nav. Co., 3 Best & S. 741.

[6] Austin *v.* Rutland R. R. Co., 45 Vt. 215.

above its natural height, a party to a deed, referring to it as a boundary, was allowed to show by parol that the former bank was the line intended.[1]

§ 2338. **Tidal Streams as Boundaries.** — If the boundary be a navigable stream, — that is, one in which the tide ebbs and flows, — the land extends only to the water's edge, or to high-water mark.[2] But he would have a right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream for his own use, subject to such general rules and regulations as the legislature may prescribe for protection of the public.[3] But where a street of which the fee is in the city lies between a lot of land and navigable waters, the owner of the land has no wharfage rights.[4] And the owner of land bounding on such a stream would have no cause of action against one, who, in navigating it, should lay his boat or vessel or raft upon the shore fronting his land, if he has not made improvements upon the same, since the title to the shore is in the State.[5] A question has arisen how far the dedication of a street as a highway gives a right of wharfage or ferry, when the street abuts on a navigable stream. It has been held that in such a case the dedication or appropriation carries the right to use the river bank for a wharf, or to wharf out.[6] So, where a street was laid out eighty feet wide along the Mississippi, it was held to extend to the thread of the stream, although this made it more than eighty feet wide, and made one side-line very irregular.[7] A conveyance bounding "westerly by the beach" excludes the shore, or land between high and low water mark.[8]

[1] Bradley *v.* Rice, 13 Me. 200, 201 ; Waterman *v.* Johnson, 13 Pick. 261.

[2] Canal Commrs. *v.* People, 5 Wend. 423, 442 ; Middleton *v.* Pritchard, 4 Ill. 520 ; East Haven *v.* Hemingway, 7 Conn. 186 ; Wheeler *v.* Spinola, 54 N. Y. 377 ; New York *v.* Hart, 95 N. Y. 443 ; Ravenswood *v.* Flemings, 22 W. Va. 52 ; Wood *v.* Chic., R. I., etc. Ry. Co., 60 Iowa, 456.

[3] Yates *v.* Milwaukee, 10 Wall. 497 ; Weber *v.* Harb. Commrs., 18 Wall. 64 ; Prov. St. Engine Co. *v.* Prov. St. B. Co., 12 R. I. 348.

[4] Potomac Steamboat Co. *v.* Upper St. Co., 109 U. S. 672.

[5] Stewart *v.* Fitch, 31 N. J. L. 20 ; Coburn *v.* Ames, 52 Cal. 385.

[6] Barney *v.* Baltimore, 1 Hughes, C. C. 118 ; McMurray *v.* Baltimore, 54 Md. 103 ; Backus *v.* Detroit, 49 Mich. 110. *Contra*, Prosser *v.* Wapello Co., 18 Iowa, 327.

[7] Brooklyn *v.* Smith, 104 Ill. 429.

[8] Niles *v.* Patch, 13 Gray, 254.

§ 2339. **The Sea and its Arms as Boundaries.** — The same is the rule where land is bounded by the sea, or an arm of the sea. The space between high and low water mark of the border of the sea is called the "shore," and belongs by common law to the sovereign, precluding, of course, the claim of any other person, unless acquired by grant from the sovereign.[1] In Connecticut, the riparian owner can claim title only to the high-water mark, but has access to deep water, and may extend his wharf into the same, if he do not thereby interfere with public navigation. He is also entitled to the alluvion, and to such seaweed as is thrown upon his soil and left there by the tide. Seaweed which is afloat is *publici juris*, and is not private property.[2] The State, in such cases, holds the fee in trust for the public; except in New York, where by an early declaration to that effect, she holds it in trust for the owner of the adjacent lands.[3] The civil and common law substantially concur in this respect, with the exception, that, by the former, the "shore" extended to the highest winter tide; whereas, by the latter, it is limited to the ordinary high-water line of the flow of the tide, which has been construed to be, on the land side, the medium line of the high water of all tides occurring in the ordinary course of nature throughout the year.[4] In the case of the lands originally held by the Colonial government of Massachusetts, the government stood in two relations to its subjects, — one as owner of the land to be granted to purchasers and settlers, to be held in severalty

[1] Hargr. Law Tracts, 12; Storer *v.* Freeman, 6 Mass. 435, 438, 439; 3 Kent, Com. 431; Cortelyou *v.* Van Brundt, 2 Johns. 362. "Beach," "strand," and "flats" are often used as identical with "shore." Doane *v.* Willcutt, 5 Gray, 328, 335; Niles *v.* Patch, 13 Gray, 254; Hodge *v.* Boothby, 48 Me. 71; Dana *v.* Jackson St. Wharf, 31 Cal. 120; Pollard *v.* Hagan, 3 How. 230; Goodtitle d. Pollard *v.* Kibbe, 9 How. 477; State *v.* Jersey City, 25 N. J. L. 525.

[2] Mather *v.* Chapman, 40 Conn. 382, 385; *ante*, § 1881.

[3] Ledyard *v.* Ten Eyck, 36 Barb. 125. As to the effect of a beach conveyed as a beach, being cut off by the sea and becoming an island, see Coleman *v.* Manhattan B. Improv. Co., 90 N. Y. 229.

[4] City of Galveston *v.* Menard, 23 Tex. 349, 392, 398; Commonwealth *v.* Roxbury, 9 Gray, 451, 483, 491; Atty.-Gen. *v.* Chambers, 4 De G. M. & G. 206, 214, 216; *s. c.* 4 De G. & J. 56, 58; Martin *v.* O'Brien, 34 Miss. 21, 36; Commonwealth *v.* Alger, 7 Cush. 63, 65; Inst. Lib. 2, T. 1, § 3; Teschemacher *v.* Thompson, 18 Cal. 21.

in fee; the other a prerogative right to the sea and seashores, in a fiduciary relation for the public use.[1] *

§ 2340. **Massachusetts Ordinance as to Flats.** — By an ordinance in 1647, the common law of Massachusetts was changed, so as to give to the owner of lands bounding on the sea, etc., the shore or *flats* adjoining it between high and low water, provided the tide does not ebb more than one hundred rods, and to that extent if the tide ebbs to a greater distance; and such is now the common law of the State. This gave the owners of the uplands the flats adjoining at the time of its passage.[2] By "flats," when used in speaking of an arm of the sea, is

* Note. — Rules of construction, somewhat arbitrary and artificial in their nature, have been applied in determining the rights of riparian owners of lands bordering upon inlets and arms of the sea, and in some cases upon rivers where the shore-line is curved or crooked, so far as relates to the flats adjacent to this line, or in the case of rivers lying between it and the thread of the stream. As the side-lines of the respective parcels belonging to different owners of the upland, if extended in a direct course to low water or to the centre of the stream, might often cross each other, some special and peculiar mode or principle of determining such admeasurement and boundary became necessary for settling these conflicting rights. The reader will find these explained in Angell on Watercourses, §§ 55, 56, and in the following cases: Emerson *v.* Taylor, 9 Me. 42; Rust *v.* Boston Mill Corp., 6 Pick. 158; Deerfield *v.* Arms, 17 Pick. 41, 44, 45; Commonwealth *v.* Alger, 7 Cush. 67; 9 Gray, 521, 522, notes and cases cited; Atty.-Gen. *v.* Boston Wharf. Co., 12 Gray, 553. It may, however, be stated as a general rule in such cases, that where land is bounded by a river on one side, and the side-lines of the lot are oblique to the course of the river from the points where the side-lines strike the edge of the stream, the side-lines are to be extended at right angles with the course of the river, if it is not navigable, to the thread of the stream; and where, as in Pennsylvania, it bounds by a navigable river in which the tide does not ebb and flow, these lines are to be extended to low-water mark, on the ground that the shore-lines of riparian owners fix the shares belonging to them of the river-bottom in front of their lots. Clark *v.* Campau, 19 Mich. 325; Bay City Gas-light *v.* Industrial Works, 28 Mich. 182; Gray *v.* Deluce, 5 Cush. 12; Stockham *v.* Browning, 3 C. E. Green, 396; O'Donnel *v.* Kelsey, 10 N. Y. 412; Wood *v.* Appal, 63 Penn. St. 210, 224. So Kreiter *v.* Bigler, 101 Penn. St. 94, where, when a highway running diagonally to the side-lines was partially vacated, the abutters were to extend their side-lines at right angles thereto. For a rule by which to divide alluvion, formed upon the bank of a navigable stream among riparian proprietors, see Batchelder *v.* Keniston, 51 N. H. 496; and for dividing flats which are granted with the adjoining upland, see Stone *v.* Boston Steel, etc. Co., 14 Allen, 230, and Wonson *v.* Wonson, id. 85.

[1] Commonwealth *v.* Roxbury, 9 Gray, 492.

[2] Boston *v.* Richardson, 105 Mass. 353. Before that time the colony owned the lands. Litchfield *v.* Scituate, 136 Mass. 39.

meant a level place over which the water stands or flows; and "shore" means the border of land alternately covered and left bare by the changing tide between high and low water.[1] An owner, however, may sell his upland and flats together or separately, the one to one man, and the other to another.[2] If he conveys land bounding on the sea, it will include the flats to low-water mark, if not exceeding the hundred rods. If he bounds the land granted by the *shore*, or running to the shore, and the like, the limits of his grant are the high-water line along the margin of the land, unless the word "shore" is coupled with the sea, so as to show that the line is intended to be that side of the shore or beach next to the sea.[3] If the boundary is "along" the shore, it means "by," "on," or "over," according to the subject-matter and the context.[4] If the boundary be tide-water, or the sea, or the harbor, it carries the flats in front of the upland; but if it be by the shore, or beach, or flats, it excludes the thing named.[5] This extends to flats adjacent to islands as well as the mainland.[6] And a disseisin of the mainland may extend to the flats.[7] As an incident to this ownership of the flats, seaweed thrown upon

[1] Church *v.* Meeker, 34 Conn. 429.

[2] Hill *v.* Lord, 48 Me. 95; Valentine *v.* Piper, 22 Pick. 94. As between two owners of adjacent flats, the dividing line, in the absence of any express provision in the deeds, is a line drawn from the termination of the upland division to the harbor line, perpendicular to the latter. Manchester *v.* Point St. Iron Works, 13 R. I. 355.

[3] Storer *v.* Freeman, 6 Mass. 435, 439; 3 Kent, Com. 434; Doane *v.* Willcutt, 5 Gray, 335; Green *v.* Chelsea, 24 Pick. 71, 77. But see Hathaway *v.* Wilson, 123 Mass. 359. The grant of a wharf may carry the flats in front of it. Ashby *v.* Eastern R. R. Co., 5 Met. 368; Doane *v.* Broad St. Association, 6 Mass. 332; Commonwealth *v.* Alger, 7 Cush. 66. See note, 9 Gray, 524, 525, and cases cited; Palmer *v.* Hicks, 6 Johns. 133; Middletown *v.* Sage, 8 Conn. 221; Hodge *v.* Boothby, 48 Me. 71. Whether this ordinance extended to New Hampshire, *quære*. Nudd *v.* Hobbs, 17 N. H. 527.

[4] Church *v.* Meeker, 34 Conn. 429.

[5] Boston *v.* Richardson, 13 Allen, 153; Paine *v.* Woods, 108 Mass. 168–172; Litchfield *v.* Scituate, 136 Mass. 39.

[6] Hill *v.* Lord, 48 Me. 95. But a mussel-bed over which the tide flows at high water, but which is not separate from the shore at low water, is not an island, but belongs to the owner of the adjacent shore. King *v.* Young, 76 Me. 76. A boundary by seashore at high-water mark, including all the privilege of the shore to low-water mark, conveys the fee in the land between the two marks. Dillingham *v.* Roberts, 75 Me. 469.

[7] Valentine *v.* Piper, 22 Pick. 94.

them or upon the shore belongs as an appurtenant to the owner of the soil ; [1] and the right to take it may be the subject of sale and conveyance, separate from the soil itself.[2] It has been held in a recent case, that where one granted by metes and bounds flats inside of low-water mark, he also granted the right to reclaim and use the flats lying outside the granted portion, and to which access could only be had by crossing the granted portion.[3]

§ 2341. **Highways as Boundaries.** — Notwithstanding it was once supposed to be otherwise, in Massachusetts at least,[4] it seems to be now a well-settled rule of law, that where land sold is bounded by a *highway*, or upon or along a highway, the thread or centre line of the same is presumed to be the limit and boundary of such land, in strict analogy with the case of a stream of water not navigable.[5] * Where the grant was of a

* Note. — But while the doctrine as stated in the text is now the settled rule of law, the cases present so many limitations and qualifications of the rule in order to carry out the intention of the parties to the grant, that it becomes necessary to refer to some of these otherwise than by their names. The reader will find the subject discussed, and numerous cases collected, in 2 Smith's Lead. Cas. (5th Am. ed.) 216. In Berridge *v.* Ward, 10 Com. B. N. S. 400, the grant was bounded by a highway, and held to extend to the *filum viæ*, although the colored plan of the lot sold, and admeasurement, extended only to the line of the road. The case of Salisbury *v.* Great N. Ry. Co., 5 C. B. N. S. 174, was one where the highway adjoining the granted premises was held to be excluded by the description taken in

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[1] Emans *v.* Turnbull, 2 Johns. 322.

[2] Hill *v.* Lord, *supra*.

[3] New Hav. St. Co. *v.* Sargent, 50 Conn. 199.

[4] Tyler *v.* Hammond, 11 Pick. 193.

[5] Newhall *v.* Ireson, 8 Cush. 595, 598 ; Hammond *v.* McLachlan, 1 Sandf. 323 ; Herring *v.* Fisher, id. 344 ; Child *v.* Starr, 4 Hill, 369, 373, unless the description, which may be the case, excludes the soil of the highway. Jackson d. Yates *v.* Hathaway, 15 Johns. 454 ; 3 Kent, Com. 433, 434 ; Chatham *v.* Brainerd, 11 Conn. 60 ; Codman *v.* Evans, 1 Allen, 443 ; Hollenbeck *v.* Rowley, 8 Allen, 473 ; Milhau *v.* Sharp, 27 N. Y. 624 ; Dubuque *v.* Maloney, 9 Iowa, 458 ; Rice *v.* Worcester, 11 Gray, 283, n. ; Bissell *v.* N. Y. Cent. R. R. Co., 26 Barb. 633 ; Gove *v.* White, 20 Wis. 432 ; Richardson *v.* Vt. C. R. R. Co., 25 Vt. 472 ; Sutherland *v.* Jackson, 32 Me. 82 ; Lord *v.* Commrs. of Sidney, 12 Moore, P. C. 497 ; Regina *v.* Board of Works, 4 Best & S. 526 ; Read *v.* Leeds, 19 Conn. 187; White *v.* Godfrey, 97 Mass. 474 ; Motley *v.* Sargeant, 119 Mass. 235 ; Peck *v.* Dennison, 121 Mass. 17; Maynard *v.* Weeks, 41 Vt. 619 ; Krister *v.* Bigler, 101 Penn. St. 94; Greer *v.* N. Y. Cent., etc. R. R. Co., 37 Hun, 346 ; Pollock *v.* Morris, 51 N. Y. Super. Ct. 112; Transue *v.* Sell, 105 Penn. St. 604 ; Helmer *v.* Castle, 109 Ill. 664 ; Dean *v.* Lowell, 135 Mass. 55.

quantity of "sedge flat" bounded by a highway running along the shore it was held to exclude the highway, and limit it to

connection with the circumstances existing at the time. In Smith *v.* Slocomb, 9 Gray, 36, the description of the premises began at an angle in the wall on the side of the road, and ran around the parcel "to a stake and stones at the aforesaid road, and thence on the line of said road to the first-mentioned bound," and was held to exclude the road. See also Sibley *v.* Holden, 10 Pick. 249; Phillips *v.* Bowers, 7 Gray, 25. So a deed bounding land by stones "on the side of a road," and where the quantity conveyed equalled the lot without including the street, was held to exclude the street. Peabody, etc. Co. *v.* Sadtler, 63 Md. 533. But in Peck *v.* Dennison, 121 Mass. 17, a boundary to a road, and thence to a stone bound on the side of that road, did not exclude the road, though another stone bound was set up at the first corner, subsequently, and a right of way was granted over the road; the court held "explicit statement or necessary implication" required to exclude. In O'Connell *v.* Bryant, id. 557, "beginning at the southerly side of the road" was held not sufficient reference to the side-line to exclude the road, though the measurements excluded, and the last bound was "to the corner begun at on the road." And to the same effect is Low *v.* Tibbetts, 72 Me. 92. *Contra*, King's Co. F. I. Co. *v.* Stevens, 87 N. Y. 287. See, also, Mead *v.* Riley, 50 N. Y. Super. Ct. 20, where the boundary began at the corner formed by the intersection of the easterly line of the road with the northerly line of another road, and thence along the easterly line of the road; and it was held to exclude the street. But in Kneeland *v.* Van Valkinburgh, 46 Wis. 434, it was held that where the boundary commenced at a point on the south line of a street, the deed conveyed to the middle of the street. In New Jersey, the doctrine of land bounding on a highway extending to the thread of the street prevails. Winter *v.* Peterson, 4 Zab. 527. If the terms of the deed show an intention to make the side-line, rather than the centre of the road, the boundary, it will be so construed. As where the line began at a corner on the side of the road, and ran by courses and distances, but without reference to the road, which, if accurately followed, would exclude it, it was held not to extend beyond the line thus indicated. Hoboken Land Imp. Co. *v.* Kerrigan, 31 N. J. L. 16. So in a more recent case in Massachusetts, where land was bounded by a thirty-foot street by a line running so many feet from a certain bound, which admeasurement brought the line to the edge of the street, it was held to exclude the street; and inasmuch as the street was a private one, in which the grantor had no interest, it was further held not to pass any right of way in the street, nor to amount to a covenant of any such right belonging to the granted premises. Brainard *v.* Boston & N. Y. Cent. R. R. Co., 12 Gray, 410. Sometimes granting land bounding upon a way or street is held to grant an easement in the way mentioned, though it may not convey any part of the soil. But that seems to be limited to cases where the grantor owns the way or street, if a private one not opened or dedicated. If he do not, neither grant nor covenant as to such easement will be implied from merely bounding upon it, unless the street be a public one, or it be laid down upon a plan referred to by the deed as an existing street. If it operates at all, it is usually by estoppel. Howe *v.* Alger, 4 Allen, 206; Roberts *v.* Karr, 1 Taunt. 495; White *v.* Flannigain, 1 Md. 540, 542; Moale *v.* Baltimore, 5 Md. 314; Hanson *v.* Campbell, 20 Md. 232; Washb. Ease. *172, *173. In Morrow *v.* Willard, 30 Vt.

the sedge flat, the grantor not owning the soil of the highway. But if one disseise another of land bordering upon a highway, he will be understood as extending his disseisin to the centre of the highway, if it belonged to the owner of the land adjacent to it.[1] And where a *road*, *street*, etc., are referred to as boundaries, it is understood to be the road as it is actually opened and in use, rather than as it was originally located, if there has been any change in this respect.[2] So if a fence has stood over twenty years along a street, and its bounds cannot be defined by record, the fence is taken as its true line.[3] And the same rule applies to a private street, as well in the city as in the country, opened by the grantor, upon which he sells

118, where the court held that bounding "south on a highway" passes the soil to its centre-line, it would, if it had said "by the north line of the highway," have excluded it altogether. And in Kimball *v.* Kenosha, 4 Wis. 331, the court say: "Unless the street or road is expressly excluded, the grantee takes to the centre." But in Cox *v.* Freedley, 33 Penn. St. 124, a grant bounding "along the southeast side of Race Street, etc.," was held to carry the land to the centre of the street, although the admeasurements, as given, carried the line only to the side of the street. Cottle *v.* Young, 59 Me. 105, 109; Woodman *v.* Spencer, 54 N. H. 507; 23 Am. Law. Reg. 411; Johnson *v.* Anderson, 18 Me. 76. The court rely much upon the identity of the rule as to roads, and streams of water, when referred to as boundaries; and if land is bounded "by the river," or "along the river," it includes the stream to its thread. The case of Paul *v.* Carver, 24 Penn. St. 207, and 26 Penn. St. 224, is to the same effect as the case above stated. See also Phillips *v.* Bowers, 7 Gray, 24, 25. From the want of any precise technical rule upon the subject, each case must be tested, in no small degree, by its own circumstances, where there has been a departure from a general reference to such way; and the following cases are added, as confirming the general doctrines stated in the text: Witter *v.* Harvey, 1 McCord, 67; Canal Trustees *v.* Havens, 11 Ill. 557; Parker *v.* Framingham, 8 Met. 267; O'Linda *v.* Lothrop, 21 Pick. 296; Harris *v.* Elliott, 10 Pet. 53; Fisher *v.* Smith, 9 Gray, 441; Grose *v.* West, 7 Taunt. 39; Headlam *v.* Hedley, F. L. Holt, 463; Steel *v.* Prickett, 2 Stark. 463; Smith *v.* Slocomb, 11 Gray, 285.

But where the grantor laid out a plan of several lots, having thereon an open space marked as "a park," and bounded the lots, in his conveyance of them, by the *park*, it was held, that the grantees were limited in their grants by the exterior line of the park, and could not claim to the centre of the space. Perrin *v.* N. Y. Cent. R. R. Co., 40 Barb. 65; Hanson *v.* Campbell, 20 Md. 223; Holt *v.* Somerville, 127 Mass. 418.

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[1] Church *v.* Meeker, 34 Conn. 426, 429.

[2] Tibbetts *v.* Estes, 52 Me. 560, 568; Falls Village W. P. Co. *v.* Tibbetts, 31 Conn. 165; Sproul *v.* Foye, 55 Me. 164; Aldrich *v.* Billings, 14 R. I. 233.

[3] Hollenbeck *v.* Rowley, 8 Allen, 475.

house-lots bounding them upon it.[1] If the boundary is a street, the line is along the centre of it.[2] If the deed refers to a plan which shows ninety feet to a passageway, and the deed runs the line ninety feet *to* the passageway, yet the ninety feet are to be measured from the centre of the way, if the grantor owns the fee in it.[3] If it is by a way of such a width, or a passageway, and the soil and freehold of the way are in the grantor, it will be the centre of such way, whether it is a private way and open, or not yet laid out or open.[4] It would, moreover, convey an easement of way over the other half of the defined way, while it reserved an easement over the part granted.[5] And if the way is laid down on a plan referred to in the deed, it carries the right of having it kept open for the use of the granted land.[6] But bounding on a street or way does not imply any obligation on the part of the obligor to make it passable by grading it or otherwise.[7] Nor does it carry the line to the centre of the street, unless the grantor owns the soil and freehold thereof; and if he do not, the terms of the deed would be satisfied by extending to the side of the street.[8] But the street would not be excluded by reason of the dimensions of the lot as given in the deed.[9] Where the adjacent owner's land extends to the centre line of the street, and it is discontinued so far as it lay over his land, he holds it thereafter free from the incumbrance;[10] and a conveyance by him, bounding upon the old way, conveys to the centre of the

[1] Hammond *v.* McLachlan, 1 Sandf. 323; Holmes *v.* Bellingham, 7 Com. B. N. S. 329; Fisher *v.* Smith, 9 Gray, 441; Phillips *v.* Bowers, 7 Gray, 26; *Re* Seventeenth Street, 1 Wend. 262; Lozier *v.* N. Y. Cent. R. R. Co., 42 Barb. 468; Bissell *v.* N. Y. Cent. R. R. Co., 23 N. Y. 61; Adams *v.* Saratoga & W. R. R. Co., 11 Barb. 434.

[2] Hawesville *v.* Lander, 8 Bush, 680.

[3] Walker *v.* Boynton, 120 Mass. 348.

[4] Cf. Lough *v.* Machlin, 40 Ohio St. 332.

[5] Stark *v.* Coffin, 105 Mass. 330; Dean *v.* Lowell, 135 Mass. 55; Falls *v.* Reis, 74 Penn. St. 439; Franklin Ins. Co. *v.* Cousens, 127 Mass. 259; Motley *v.* Sargent, 119 Mass. 236; Lewis *v.* Beattie, 105 Mass. 410; Boston *v.* Richardson, 13 Allen, 154; Fisher *v.* Smith, 5 Gray, 444; White *v.* Godfrey, 97 Mass. 472; Winslow *v.* King, 14 Gray, 323; Smith *v.* Howden, 14 Com. B. N. S. 398.

[6] Cox *v.* James, 59 Barb. 144.

[7] Hennesey *v.* Old Colony & N. R. R. Co., 101 Mass. 540.

[8] Dunham *v.* Williams, 37 N. Y. 251.

[9] Sherman *v.* McKeon, 38 N. Y. 271.

[10] Wallace *v.* Fee, 50 N. Y. 694.

way.[1] It extends to lands bounding upon dedicated streets as well as to such as are regularly laid out and accepted, if they are open and in use.[2] It extends also to streets in the city of New York.[3]

§ 2342. **Artificial Objects of Width as Boundaries.** — And in all cases of boundary, where the object referred to in the description is of considerable width, like an artificial ditch, a stone wall, and the like, the grant extends to the centre of it.[4] "Whenever land is described as bounded by other land, or by a building, the name of which, according to its legal and ordinary meaning, includes the title to the land of which it has been made part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary-line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not, in its description or nature, include the earth as far down as the grantor owns, and yet which has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the centre of the thing so running over or standing on the land is the boundary of the lot granted."[5]

§ 2343. **Parol Evidence to identify Monuments.** — Parol evidence is often admissible and necessary to identify and ascertain the locality of such monuments, and which of two or more objects answering the description of the monument named was intended, as where the monument is a pine-tree, and there are two, to either of which the description in the deed might refer.[6] So where the description in the deed leaves the boundaries in-

[1] Ott *v.* Kreiter, 2 Eastern Rep. 611.

[2] Weisbrod *v.* C. & N. W. Ry. Co., 18 Wis. 43; Banks *v.* Ogden, 2 Wall. 57, 69.

[3] People *v.* Law, 22 How. Prac. 115; Wetmore *v.* Law, id. 130.

[4] Child *v.* Starr, 4 Hill, 369, 373; Warner *v.* Southworth, 6 Conn. 471, 474; Bradford *v.* Cressey, 45 Me. 9; Woodman *v.* Spencer, 54 N. H. 507; 23 Am. L. Reg. 411.

[5] Boston *v.* Richardson, 13 Allen, 154, 155; Woodman *v.* Spencer, 54 N. H. 507; 23 Am. L. Reg. 411.

[6] Waterman *v.* Johnson, 13 Pick. 267; Frost *v.* Spaulding, 19 Pick. 445, 447; Barrett *v.* Murphy, 140 Mass. 133; Ferris *v.* Coover, 10 Cal. 624; Middleton *v.* Perry, 2 Bay, 539; Claremont *v.* Carleton, 2 N. H. 369, 373; Colton *v.* Seavey, 22 Cal. 496.

tended doubtful, it is competent to show the practical construction given by the parties to the language used.[1] If parties agree by parol as to what shall be a boundary between their lands, and acquiesce in it, it may be binding upon them, although sufficient time to establish adverse possession may not have passed.[2] In all these cases, the question, *what* the boundaries of a given piece of land which has been conveyed by deed are, is for the court; *where* these boundaries are is a question for the jury.[3] What is the true location of a survey is not one of construction, nor a question of law, but of fact;[4] and whether a particular piece of land is included within the boundaries mentioned, if these are in dispute, is a question for the jury.[5]

§ 2344. **Parol Evidence of Supposition of Parties.** — But it is not competent to control the boundaries given in a deed by parol evidence that the parties supposed other land, in addition to what is embraced within such bounds, was included in the grant, or that the monument expressly described is different from the one intended.[6]

§ 2345. **Reputation and Hearsay to establish Boundaries.** — What is called *reputation* is never evidence of title, nor is it admissible in support of private rights.[7] But it is sometimes admitted to establish what are the boundaries of particular parcels intended to be conveyed by deed, though it is believed that the monuments which may be thus identified must be both ancient and of a public or *quasi* public nature. Thus traditional

[1] Stone *v.* Clark, 1 Met. 378; Choate *v.* Burnham, 7 Pick. 274, 278; 3 Dane, Abr. 363; Taylor *v.* Steele, 1 A. K. Marsh. 315; Gratz *v.* Beates, 45 Penn. St. 504.

[2] Smith *v.* Hamilton, 20 Mich. 433.

[3] Abbott *v.* Abbott, 51 Me. 581.

[4] Opdyke *v.* Stephens, 4 Dutch. 90.

[5] Pettingill *v.* Porter, 3 Allen, 349.

[6] Frost *v.* Spaulding, 19 Pick. 445, 448; Child *v.* Wells, 13 Pick. 121, where a deed which described and granted half of A, also B, also half of G, was held to convey the entire parcel B. Pride *v.* Lunt, 19 Me. 115. If a deed declares that a certain stake is a corner, parol evidence is not admissible to show that the stake is not the corner. McCoy *v.* Galloway, 3 Ohio, 283; Emerick *v.* Kohler, 29 Barb. 169; Parker *v.* Kane, 22 How. 1; Clark *v.* Baird, 9 N. Y. 183; Dodge *v.* Nichols, 5 Allen, 548; Spiller *v.* Scribner, 36 Vt. 247; Gilman *v.* Smith, 12 Vt. 150; Peaslee *v.* Gee, 19 N. H. 278; Terry *v.* Chandler, 16 N. Y. 358; Dean *v.* Erskine, 18 N. H. 83, parol evidence excluded tending to show the grant of an entire lot, though described as half of it. Drew *v.* Swift, 46 N. Y. 209.

[7] Green *v.* Chelsea, 24 Pick. 71, 80.

evidence is admissible to show boundaries of ancient parishes.[1] So, in one case, it was admitted to establish the line of a public grant of great notoriety made many years before, and which was referred to as a monument in a deed of adjacent land.[2] So a map was admitted to establish a line which was proved to have been in existence many years, and referred to by the proprietors of the lands designated thereon as the original map of their location.[3] So an ancient deed proves itself, and is admissible to prove boundary.[4] But there is a singular looseness as well as discrepancy in the ruling of different courts upon the competency of reputation and hearsay evidence in establishing particular monuments and boundaries of private lands. Thus, in one case, McLean, J., instructed the jury that "reputation is admissible evidence to prove boundaries;" that what an individual had said of certain lines and corners did not constitute *reputation;* "the reputation must be general in the neighborhood."[5] A similar doctrine is maintained by the court of Kentucky.[6] In North Carolina, "hearsay is evidence upon the question of boundary." So one may show "common reputation and understanding in the neighborhood."[7] And language about as strong is used by McLean, J., in the court of the United States.[8] In Pennsylvania, the court limited the testimony of what another person had said to the declarations of one then deceased.[9] In New Hampshire, Richardson, C. J., refers to numerous cases, where, "in questions of boundary, declarations as to common opinion of the place, made by deceased persons, who from their situation had the means of knowledge, and no

[1] 1 Greenl. Ev. § 145.

[2] Taylor *v.* Shufford, 4 Hawks, 116, 132.

[3] Harmer *v.* Morris, 1 McLean, C. C. 44; Whitney *v.* Smith, 10 N. H. 43; Gratz *v.* Beates, 45 Penn. St. 505.

[4] Quinn *v.* Eagleston, 108 Ill. 248.

[5] Nelson *v.* Hall, 1 McLean, 518.

[6] Smith *v.* Prewit, 2 A. K. Marsh. 158; Beaty *v.* Hudson, 9 Dana, 322; Smith *v.* Shackleford, 9 Dana, 455; Cherry *v.* Steele, Lit. Sel. Cas. 9.

[7] Den d. Sasser *v.* Herring, 3 Dev. 340; Tate *v.* Southard, 3 Hawks, 119. But, by a more recent case, report or reputation in the neighborhood is not evidence of a paper title. Den *v.* Cassells, 3 Dev. & B. 49.

[8] Boardman d. Mendenhall *v.* Reed, 6 Pet. 341; Conn *v.* Penn, 1 Pet. C. C. 511, per Washington, J.; Opdyke *v.* Stephens, 4 Dutch. 89.

[9] Buchanan *v.* Moore, 10 S. & R. 281. See Abington *v.* N. Bridgewater, 23 Pick. 175, per Putnam, J.; Pettibone *v.* Rose, Brayt. (Vt.) 77.

interest to misrepresent, have been generally considered admissible."[1] In Virginia, this doctrine is fully sustained in a very elaborate opinion by Tucker, Pres. J.[2] In Ohio, such reputation cannot be admitted to control record evidence; though, "where corners are lost, they may be proved by reputation."[3] The rule on this subject, as adopted in Florida, is thus stated: "Such evidence, taken in connection with other evidence, is entitled to respect in cases of boundary, where the lapse of time is so great as to render it difficult, if not impossible, to prove the boundary by the existence of the primitive landmarks, or other evidence than that of hearsay."[4] And in New Jersey in the case of Opdyke *v.* Stephens, cited above, the court say that "ancient reputation" is one of the things held competent to be shown to establish boundaries. The subject is ably examined by Mr. Greenleaf, in his treatise on Evidence, where many of these cases are considered; and the conclusion to which he comes is undoubtedly the sound one, that the general rule of law of this country excludes such evidence, when offered for the purpose of proving the boundary of a private estate.[5]

§ 2346. **Declarations of Deceased Owners.** — But this does not exclude evidence of admissions and declarations as to boundaries of land made by an owner while in occupation thereof.[6] The question was considered in Bartlett *v.* Emerson, where former cases decided by the court are commented upon by Thomas, J. In that case, a wood-cutter, then deceased, who had worked for more than fifty years upon the lot whose boundary was in question, and lived near it, but never owned or occupied either of the lots, had, at the request of the plaintiff, gone upon the plaintiff's lot in presence of witnesses, and pointed out an ancient stake which he declared was the corner-bound. The court held the evidence incompetent. They over-

[1] Shepherd *v.* Thompson, 4 N. H. 214; Great Falls Co. *v.* Worster, 15 N. H. 412, 437.

[2] Harriman *v.* Brown, 8 Leigh, 697, 707, *et seq.*

[3] McCoy *v.* Galloway, 3 Ohio, 282.

[4] Daggett *v.* Willey, 6 Fla. 511.

[5] 1 Greenl. Ev. § 145 and note; Bartlett *v.* Emerson, 7 Gray, 174; Gratz *v.* Beates, 45 Penn. St. 505.

[6] Jackson d. M'Donald *v.* M'Call, 10 Johns. 377; Daggett *v.* Shaw, 5 Met. 223; Van Deusen *v.* Turner, 12 Pick. 532; Orr *v.* Hadley, 36 N. H. 575. See Ware *v.* Brookhouse, 7 Gray, 454.

rule the case of Van Deusen *v.* Turner, so far as it conflicts with this ruling, and restrict the admissibility of such declarations to those of persons not living at the time of the trial, made while in possession of land owned by them, and when in the act of pointing out their boundaries, with respect to such boundaries, where nothing appears to show an interest to deceive or misrepresent. The fact of the witness going upon the land, and the finding of the stake, do not seem to have been objected to, but merely the declarations made as to what it indicated.

§ 2347. **Declarations of Deceased Owners — continued.** — [Not only must the declarant be dead, but he must have been the owner of the premises and in occupation of them at the time; and the person for or against whom such declaration is sought to be introduced must claim under the declarant.[1] Therefore, the declaration of a life tenant would not be received to affect the title of the reversioner;[2] nor that of a tenant in common to affect the title of his co-tenant;[3] nor that of one lot owner for or against his neighbor.[4]] But in Vermont, the declaration of one who had owned the land, but did not then own it, was received after his death.[5]

§ 2348. **Reference by one Deed to another adopts its Description.** — Where one deed refers to another for a description of the granted premises, it is regarded as of the same effect as if the latter was copied into the deed itself, and what is therein described will pass.[6] Thus where the same grantor conveys two parcels of land to two different owners at the same time, one of which contains the grant of an easement over the other, and this is referred to in the other's deed, they are to be construed together in ascertaining what such easement is, and

[1] Wood *v.* Foster, 8 Allen, 24; Smith *v.* Forrest, 49 N. H. 230; Noyes *v.* Morrill, 108 Mass. 399.

[2] Papendick *v.* Bridgewater, 5 Ellis & B. 166.

[3] Pier *v.* Duff, 63 Penn. St. 59.

[4] Sullivan Granite Co. *v.* Gordon, 57 Me. 522.

[5] Wood *v.* Willard, 37 Vt. 377.

[6] Allen *v.* Bates, 6 Pick. 460; Foss *v.* Crisp, 20 Pick. 121; Langmaid *v.* Higgins, 129 Mass. 353; Vance *v.* Fore, 24 Cal. 444; Boylston *v.* Carver, 11 Mass. 515, 517; Jenks *v.* Ward, 4 Met. 404; Allen *v.* Taft, 6 Gray, 552; Lippett *v.* Kelley, 46 Vt. 523; Waterman *v.* Andrews, 14 R. I. 589.

what are its limitations.[1] So in the grant of a mill and buildings by metes and bounds, "together with all the water-privilege that was conveyed by A to B by deed:" it was held, that the deed referred to fixed the extent of the privilege, instead of the extent of flowing at the date of the grant.[2] But a reference to a deed will not exclude a parcel actually granted in the deed in which the reference is made, though not included in the deed referred to.[3] Nor will a particular description in a deed be enlarged merely by reference to another deed, although the grantor "intended to convey the same and identical real estate conveyed by said" former deed. It is a question of the intent of the grantor upon the whole instrument.[4] It does not make any difference that the deed referred to has not been duly acknowledged or recorded. But if a deed or plan is referred to as one on record, no other than a recorded deed or plan is competent to be used in evidence.[5]

§ 2349. **Meanings of particular Words in Descriptions.** — In applying boundaries and monuments referred to in a description of granted premises, "between" two objects, excludes these objects and all not lying within them.[6] So "from" an object, or "to" an object, or "by" it, excludes the terminus referred to.[7] "Beginning at the southwest corner of the granted premises, at A B's northeast corner," means that the corner of these lots should be coincident and identical.[8]

§ 2350. **Effect of Reference to Maps or Plats.** — Where lines are laid down upon a plan, and are referred to accordingly in a deed, they are to be regarded as giving the true description of the parcel, as much as if expressly recited in the deed itself,[9] but only as concerns the land granted and its immediate

[1] Knight *v.* Dyer, 57 Me. 176.

[2] Perry *v.* Binney, 103 Mass. 158.

[3] Needham *v.* Judson, 101 Mass. 161; Whiting *v.* Dewey, 15 Pick. 434.

[4] Brunswick Sav. Inst. *v.* Crossman, 76 Me. 577.

[5] Simmons *v.* Johnson, 14 Wis. 526; Caldwell *v.* Center, 30 Cal. 543.

[6] Revere *v.* Leonard, 1 Mass. 91.

[7] Hatch *v.* Dwight, 17 Mass. 289, 298; 4 Greenl. Cruise, Dig. 265, note; Bonney *v.* Morrill, 52 Me. 256; Millett *v.* Fowle, 8 Cush. 150; Carbrey *v.* Willis, 7 Allen, 370, whether bounding by "a house" is the body or eaves of the building. Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491.

[8] Bailey *v.* White, 41 N. H. 343.

[9] Davis *v.* Rainsford, 17 Mass. 207, 211; Kennebec Purchase *v.* Tiffany, 1 Me.

vicinity.[1] In this way, a line may be supplied which was omitted in the description contained in the deed.[2] So a plan referred to in a deed, describing land as bounded by a way laid down upon a plan, may be used as evidence in fixing the locality of such way.[3] Ancient maps and surveys are evidence to elucidate and ascertain boundaries and fix monuments.[4] If a plan is referred to in a deed for description, and on it are laid down courses, distances, and other particulars, it is the same as if they were recited in the deed itself. So if a point in the description of a parcel granted bound by a way, there is an implied grant of a right of way to connect between the street or public way and the way by which the parcel is bounded; and this connecting way may be ascertained by a reference to the plan on which the way is laid, provided these passageways are over the grantor's land. And such would be the effect if the lot granted adjoined the passageway as laid down upon the plan of lots referred to, although the parcel were not expressly bounded in the deed by the way.[5] But though a deed refers to a plat or plan of land, or a line, it may be read in evidence without producing the plat or plan; and the line may be established by other competent evidence, as, for example, by long possession up to a fence standing upon the line.[6]

§ 2351. **Of Recitals in Deeds, and their Effect.** — It is often customary to insert in a deed, by way of explanation or for some similar purpose, recitals of certain things, which, though not necessarily a part of the deed, are often useful in aiding to understand the intention of the parties to the same. In the celebrated case of Cholmondeley *v.* Clinton, the judgment of

219; Thomas *v.* Patten, 13 Me. 329; Lunt *v.* Holland, 14 Mass. 149; Shirras *v.* Caig, 7 Cranch, 48; McDonald *v.* Lindall, 3 Rawle, 496; Ferris *v.* Coover, 10 Cal. 622; Morgan *v.* Moore, 3 Gray, 319; Farnsworth *v.* Taylor, 9 Gray, 162, as to passing streets exhibited upon a plan. See also Rodgers *v.* Parker, id. 445; Murdock *v.* Chapman, 9 Gray, 158; Spiller *v.* Scribner, 36 Vt. 247; Birmingham *v.* Anderson, 48 Penn. St. 253; Parker *v.* Bennett, 11 Allen, 393.

[1] Bost. Wat. Pow. Co. *v.* Boston, 127 Mass. 374; Williams *v.* Bost. Wat. Pow. Co., 134 Mass. 406.

[2] Chamberlain *v.* Bradley, 101 Mass. 191.

[3] Stetson *v.* Dow, 16 Gray, 374.

[4] McCausland *v.* Fleming, 63 Penn. St. 36.

[5] Fox *v.* Union Sugar Refinery, 109 Mass. 292; Baxter *v.* Arnold, 114 Mass. 577; Tobey *v.* Taunton, 119 Mass. 410.

[6] Deery *v.* Cray, 10 Wall. 263.

the court was materially affected by the clew to the intention of the parties supplied by the recitals in the deed. The language of Wilde, J., upon this subject, is: "Every deed is to be construed according to the intention of the parties, as manifested by the entire instrument, although it may not comport with the language of a particular part of it." Thus a recital or a preamble in a deed may qualify the generality of the words of a covenant or other parts of a deed.[1] And he illustrates his proposition by a case where the lands intended to be conveyed were particularly named in the preamble, and were afterwards minutely described in the premises; to which was added a sweeping clause, purporting to convey "all other the donor's lands, tenements, and hereditaments in Ireland." But it was held, that this general clause was limited and restricted by the recitals and preamble, and nothing passed beyond what was there described.[2] These recitals are usually a part also of the premises of the deed.[3] In a recent case it was held, that a recital in a deed might constitute a covenant, and render the party liable accordingly.[4]

§ 2352. **Exceptions, how made, and of what.** — If the grantor wish to except anything out of what he may, in general terms, have granted, it is proper that such exception should follow the description of the thing granted; and it comes, therefore, under the head of the premises in the deed. As an exception is the taking of something out of the thing granted which would otherwise pass by the deed, it may be said, in general terms, that it ought to be stated and described as fully and accurately as if the grantee were the grantor of the thing excepted, and the grantor, in the deed, were made the grantee by the exception. It must, in the first place, be a part of the thing included in the grant, and to be taken, in substance, out of that; in which respects it differs from a reservation, which, as will be explained, is always of some new right not *in esse*, in substance at the making of the grant. Exceptions are often made in the form of a reservation, where the thing intended not to pass by

[1] Allen *v.* Holton, 20 Pick. 463, 464.

[2] Moore *v.* Magrath, Cowp. 9. See Peck. *v.* Hensley, 20 Tex. 673, 677.

[3] Cholmondeley *v.* Clinton, 2 Jac. & W. 134; Shep. Touch. Prest. ed. 76, and cases cited in the note; 4 Cruise, Dig. 264.

[4] Farrall *v.* Hilditch, 5 C. B. N. S. 840.

the deed is then existing. Thus the grant of a farm, "reserving to the public the use of the road through said farm," "also reserving for W. R. R. the roadway for said road as laid out," etc., was held to except the easement of the public and of the railroad out of the granted premises, and that the soil and freehold of these passed by the deed, the effect being to create an *exception*, and not a *reservation*.[1]

§ 2353. **Distinction between Exception and Reservation.** — The uncertainty arising from this cause renders it necessary to refer to rules laid down by the courts for discriminating between exceptions and reservations. "A title or right acquired by the grantor by reservation in a deed-poll stands, in this respect, upon the same footing as that which is acquired by direct grant or conveyance; but whatever is excluded from the grant by exception *remains* in the grantor as of his former title or right.[2] If, by the deed, the grantor reserves a license to enter upon the granted premises and extract from mines therein a limited quantity of ore, and to become thereby revested in the property of what is thus separated, it is a *reservation* proper; if it is a reservation of an exclusive right to extract ore, retaining in the grantor the property in the mines, it is an *exception* from the grant.[3] So where A granted land to B, reserving one acre to C. As a reservation it would be void, in being made to a stranger; and it was therefore held to be an *exception* of the acre, and that C took nothing.[4] And where B had a right of way across A's land, and in conveying it, A reserved the right of way to B, it was held to be an *exception* of the right of way out of the granted premises, because, as a reservation to a stranger, it would be invalid.[5] That the thing intended to be saved to the grantor is an easement is not a reliable test of its being a reservation. It may be an exception, as was held in case of a partition by two tenants in com-

[1] Richardson *v.* Palmer, 38 N. H. 212, 223; Hurd *v.* Curtis, 7 Met. 110; Pettee *v.* Hawes, 13 Pick. 323; Kister *v.* Reeser, 98 Penn. St. 1.

[2] Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 321.

[3] Ib. 322. A right of way, to be kept in repair by the grantor of land, is a reservation, not an exception. Ashcroft *v.* Eastern R. R. Co., 126 Mass. 196.

[4] Corning *v.* Troy Iron, etc. Factory, 40 N. Y. 209.

[5] Bridger *v.* Pierson, 45 N. Y. 601, 603; West Point Iron Co. *v.* Reymert, 45 N. Y. 707.

mon, by mutual deeds of grant, in one of which the grantor reserved to himself a right of way of a certain width to his own lot over the lot of the other. It was held to be a part of the right previously enjoyed *excepted* out of the grant.[1] So where one sold a well which supplied several houses, stables, etc., with water, excepting the branches of the aqueduct conducting to the "take-outs" of the grantor at his store, etc., it was held to be an *exception* from the grant.[2] But whether it be a reservation or an exception of a right to use and enjoy land, it will extend to the *assigns* of the one in whose favor it is created.[3] So in Fancy *v.* Scott, where, in the lease, the lessor *reserved* the peat and a right to dig it, and so pleaded it as a reservation, it was held to be an *exception*, and not a reservation. "A landlord cannot *reserve* a component part of the lands demised or granted."[4] Accordingly, when A sold his land *reserving* the coal, it was held to be an *exception*, thereby making the grantor the separate and absolute owner of the coal.[5] So where one granted, "except as hereinafter excepted," it being in the granting part of the deed, it was held not to be an exception out of the thing granted, but an excluding of such part from the grant altogether: *si quis rem dat et partem retinet, illa pars quem retinet semper cum eo est et semper fuit.*[6] The effect, in such a case, in respect to the thing excepted, is as if it never had been included in the deed.[7] So there may be an exception out of an exception, limiting the general effect of the exception, and withdrawing something from its operation, which will therefore pass by the general grant.[8]

§ 2354. **What may be excepted.** — The exception must not be repugnant to the grant: if it is, it is void. Consequently, while it is competent to make an exception of a particular thing out of a general grant, it is not so if the grant itself is

[1] Bowen *v.* Conner, 6 Cush. 132, 137; Dennis *v.* Wilson, 107 Mass. 591. See Munn *v.* Worrall, 53 N. Y. 44.

[2] Emerson *v.* Mooney, 50 N. H. 316.

[3] Mitcalfe *v.* Westaway, 17 C. B. N. S. 658, 667; Dennis *v.* Wilson, *sup.*

[4] Fancy *v.* Scott, 2 Man. & R. 335. See also Doe d. Douglas *v.* Lock, 2 Ad. & E. 724; Dyer, 19 a, pl. 110, 143 a; *post*, § 2362.

[5] Whitaker *v.* Brown, 46 Penn. St. 197.

[6] Greenleaf *v.* Birth, 6 Pet. 302, 310; Co. Lit. 47 a.

[7] 1 Wood, Conv. 207, and Powell's note; Shep. Touch. 77.

[8] 1 Wood, Conv. 208; Shep. Touch. Prest. ed. 78, and note.

special and particular. Thus, if the grant were of a lot of land, describing it, and making general mention of its quantity, — as twenty acres, for instance, — it would be competent to except out of it one acre; but, if the grant had been of twenty acres specifically, it would be obviously repugnant to such a grant to except one acre. In the one case, the twenty acres are mentioned as a part of the description of the entire lot or parcel; in the other, the grant is of each and every acre of the twenty, and to except one is to take back what had been once specifically granted.[1] So one may grant a farm, excepting the meadow; but to grant a pasture and meadow, excepting the meadow, would be repugnant and void.[2] The rule, as given in one of the cases, is, that exceptions must be of something that can be severed from what is granted. Reservations are always of something issuing or coming out of the thing or property granted, and not a part of the thing itself. They must be to the grantor, and not to a stranger: if to a stranger, they are void.[3] In one case, an administrator sold the estate of his intestate after his wife had had her dower set out, and in it described the premises by metes and bounds, excepting the widow's thirds of so many acres, set off on the west side of the tract. It was held to be an exception of her life-estate in that part of the tract, and not so much of the tract itself in fee.[4]

§ 2355. **The Incidents to an Exception.** — It may be added, that whatever may pass by words of grant may be excepted by like words, and the same consequences attached to such an exception as would have attached had it been a grant; such as, for instance, that it carries with it constructively to the grantor making the exception all the necessary means of enjoying or availing himself of it.

§ 2356. **Illustrations.** — Thus if one grant land, excepting the trees, he has a right to enter and cut them and carry them away.[5] So, if he excepts the mines, he retains the powers

[1] Shep. Touch. 79; Sprague *v.* Snow, 4 Pick. 54; Cutler *v.* Tufts, 3 Pick. 272; 4 Greenl. Cruise, Dig. 271, note.

[2] Shep. Touch. 79.

[3] Borst *v.* Empie, 5 N. Y. 38; Barber *v.* Barber, 33 Conn. 335; *post*, § 2363.

[4] Crosby *v.* Montgomery, 38 Vt. 238; Stockwell *v.* Couillard, 129 Mass. 231.

[5] Shep. Touch. 100; Broom, Max. 365; Dand *v.* Kingscote, 6 Mees. & W. 174; Pettee *v.* Hawes, 13 Pick. 322, 327.

incident to working them.[1] So, if the exception from an estate be a mill standing upon it, it includes therewith the land under it, and so much as is necessary to use it, with the necessary privileges of water for working it, unless this water-privilege and land be the estate particularly granted, in which case the exception would only cover the building.[2] The *reservation* of "a cider-house and cider-mill" standing upon land which is granted, "so long as the cider-house shall stand," was held to be a reservation of a freehold estate in the land on which the buildings were, as long as they should stand irrespective of the use made of them.[3]

§ 2357. **The Habendum.** — The next orderly part of a deed is the *habendum*, which begins at the words "to have and to hold," etc., the office and purpose of which are to limit and define the estate which the grantee is to have in the property granted, such as whether for life, in fee, and the like. It is not an essential part of a deed; and Chancellor Kent declares that it has degenerated into a mere useless form. If the granting part of the deed contain proper words of limitation, the *habendum* may be dispensed with altogether; and of so little importance is it deemed, compared with the words of the grant, that, if the *habendum* is clearly repugnant to the grant, it is treated as of no validity or effect.[4] But where the grant is indefinite from its generality in respect to the estate in the lands conveyed which it is intended to create in the grantee, the *habendum* serves to define, qualify, or control it.[5] Thus a lease of land to one, *habendum* to him and his heirs, conveys a fee.[6]

§ 2358. **Habendum — Construction and Effect.** — An *habendum* may, therefore, be regarded as the clause following the granting part of the premises in a deed which defines the extent of ownership in the thing granted, to be held and

[1] Wms. Real Prop. 174.

[2] Allen *v.* Scott, 21 Pick. 25; Howard *v.* Wadsworth, 3 Me. 471. See, as to the exception of a house in granting a farm, Sanborn *v.* Hoyt, 24 Me. 118.

[3] Esty *v.* Currier, 98 Mass. 500.

[4] Flagg *v.* Eames, 40 Vt. 23.

[5] Co. Lit. 6 a; Termes de la Ley, "Habendum;" Sumner *v.* Williams, 8 Mass. 162, 174; 1 Wood, Conv. 224, and Powell's note; Shep. Touch. 475; 4 Kent, Com. 468; Berry *v.* Billings, 44 Me. 423.

[6] Jamaica Pond Aq. Corp. *v.* Chandler, 9 Allen, 168.

enjoyed by the grantee, and can, therefore, be applied to use only when the granting words leave the subject of such ownership open to explanation. Thus a grant to A of certain lands, without any other words of limitation, leaves it doubtful what is to be the extent of ownership, as to time, which he is to have therein; though, to supply the omission, the common law would construe it to mean that he should enjoy it for life. But if a clause follows the grant, declaring that he is to hold the estate for years, or to himself and his heirs, it simply defines what had been before left indeterminate. So if the grant be to "A and his heirs," the term "heirs" is indefinite; though, if no explanation is given, the law construes it to mean heirs generally. But a clause following the grant, declaring that he is to hold to him and the "heirs of his body," simply defines what heirs were meant by the general term used in the grant. But because the broadness of the grant, if to one and his heirs, embraces all minor estates, it has been held, as it is said, that though the limitation in the *habendum* be to a certain class of heirs, namely, to heirs of the body, and would be good, yet, if this class of heirs were to fail, the general heirs of the grantee would take; there being at first, by the terms of the grant, a fee-simple which is expectant upon the estate-tail which is first to take effect.[1] The rule, as stated by Mr. Powell in the note above cited, is this: "Where a deed first speaks in general words, and afterwards in special words, and the latter accord with the former, this deed shall operate according to the special words, whether they enlarge or restrain the general words that precede."[2] Thus where A made a deed of an estate to J. S. for life, and to her eldest son who should be living at her death, and to his eldest son living at his death, and so on, with an *habendum* "to A and her heirs as aforesaid," it was held to be a grant to A for life; and that the *habendum* to her heirs aforesaid was to be taken as meaning her son, who took

[1] 1 Wood, Conv. 224, Powell's note. See also Shep. Touch. 102. Mr. Preston, in his edition of the latter work, in a note to the same, denies the proposition. But see Thurman *v.* Cooper, Poph. 138.

[2] 1 Wood, Conv. 199, 212, 223, 224, note; Perkins, § 167; 4 Cruise, Dig. 274; Wrotesley *v.* Adams, Plowd. 187, 196.

a remainder as purchaser.[1] The *habendum* may enlarge, expound, qualify, or vary the estate granted in the premises;[2] but it can never extend the subject-matter of the grant.[3] So the terms of the grant may be qualified and limited by those of the *habendum*, when express reference is made in the premises to the *habendum*. Thus where one granted to A three hundred acres of land, "subject to the limitations hereinafter expressed as to part thereof," and in the *habendum* one hundred and fifty acres designated were to the use of the grantee during his life, and at his decease to go to his children, it was held to give a fee in one half, and a life-estate in the other.[4] The words of the *habendum* are mere "words of limitation," as they are called, in distinction from the words in the grant, which are those "of purchase;"[5] and in those States where a fee may by statute be limited without the word "heirs," a proper reference is to be had to the terms of these statutes in determining how far the grant and *habendum* are compatible and consistent with each other.

§ 2359. **Habendum has no Effect on what is not granted.** — If, therefore, anything is embraced in the *habendum* which is not granted, it does not pass. Thus upon a grant of Blackacre, *habendum* Blackacre and Whiteacre, the first only passes. If, however, the person who is to take is not named in the grant, he may be ascertained if named in the *habendum;* since there is no repugnancy between the two, and the grant alone takes effect.[6] A stranger to the deed may take by way of remainder, though not named in the premises; but otherwise one shall not take a present interest jointly with another, unless named in the premises.[7] So if a feoffment be to A and B of two acres, *habendum* one acre to A, and the

[1] Ford *v.* Flint, 40 Vt. 382.

[2] Moss *v.* Sheldon, 3 Watts. & Serg. 162.

[3] Manning *v.* Smith, 6 Conn. 292.

[4] Tyler *v.* Moore, 42 Penn. St. 374, 388.

[5] 4 Cruise, Dig. 265; 1 Wood, Conv. 212.

[6] Spyve *v.* Topham, 3 East, 115; 1 Wood, Conv. 206, 212; 4 Cruise, Dig. 272; Shep. Touch. 75; 2 Prest. Conv. 380, 433; *contra*, Bustard *v.* Coulter, Cro. Eliz. 902, 903; Berry *v.* Billings, 44 Me. 424; Sumner *v.* Williams, 8 Mass. 174.

[7] Co. Lit. 26 b, note, 154; Greenwood *v.* Tyber, Cro. Jac. 564; Brooks *v.* Brooks, id. 434.

other to B, it is incompatible with the grant, and will not stand against the grant to the two.[1]

§ 2360. **Habendum must not be repugnant to Grant.** — If, however, there is a clear repugnance between the nature of the estate granted and that limited in the *habendum*, the latter yields to the former; but if they can be construed so as to stand together by limiting the estate without contradicting the grant, the court always gives that construction in order to give effect to both. If, therefore, a grant be to A and his heirs, *habendum* to him for years or for life, the restrictive clause is void, because it contradicts and defeats the grant.[2] Where, by the premises, the estate is granted to one, it cannot by the *habendum* be limited to another; nor can the *habendum* frustrate a grant complete before, or abridge or lessen the estate granted.[3] A lease to A, *habendum* to him and his heirs for a hundred years, will be a good *habendum* for years; the incompatible clause of "his heirs," as words of inheritance, being held void, the estate demised being one for years only.[4] Where the grant was to A, her heirs and assigns, *habendum* to the use of A and *heir* heirs and assigns, it was held that the word "heir," which was plainly a clerical error, did not cut down the fee.[5]

§ 2361. **The Habendum serves to limit the Uses**, or to declare to what use the party to whom the deed is made shall have the thing granted, and generally to limit the uses to which the estate shall be held;[6] and this, it will be recollected, by recurring to the doctrine of uses, may be important, where no consideration is expressed or proved, in preventing the use from resulting to the grantor.[7] It may be added, that, though usually inserted immediately after the premises,

[1] 1 Wood, Conv. 199, 212; Shep. Touch. 76; Hafner *v.* Irwin, 4 Dev. & Bat. 434.

[2] 1 Wood, Conv. 199, 212, 224; Shep. Touch. 102; 4 Cruise, Dig. 273; Tyler *v.* Moore, 42 Penn. St. 376.

[3] Nightingale *v.* Hidden, 7 R. I. 118; 4 Cruise, 272; Watters *v.* Breden, 70 Penn. St. 237. So, of a quitclaim deed. Green Bay Co. *v.* Hewitt, 55 Wis. 96.

[4] Shep. Touch. 76.

[5] Huntingdon *v.* Lyman, 138 Mass. 205.

[6] Shep. Touch. 114; 1 Wood, Conv. 212; Nightingale *v.* Hidden, 7 R. I. 118.

[7] *Ante*, § 1385 *et seq.*

the *habendum* may be embraced in any other part of the deed, and be equally valid.[1]

§ 2362. **The Reddendum.** — If anything is to be reserved out of the property granted, it is usually done by the clause of *reddendum*, as it is called, which commonly follows that of the *habendum*. A reservation should be carefully distinguished from an exception. The difference between the two has already been explained.[2]

§ 2363. **A Reservation must be to the Grantor** and not to a stranger. Thus a reservation in a grant to A of B's right of way, or his right to take seaweed and the like, gives no right to B, unless he had it before. It merely saves the grantor from liability arising from his covenant against incumbrances in case B had such a right.[3]

§ 2364. **Limitations of Reservations the same as of Grants.** — A reservation being equal to a grant, there must be proper words of limitation and inheritance, if the grantor intends to secure it to himself and his heirs, or extend the enjoyment beyond his own life.[4] A reservation of the trees on the land conveyed to the grantor and his heirs is a reservation of the fee in the trees then standing, with a right of soil to have them stand and grow until cut, and a right to enter and cut them. A reservation of the wood and trees forever growing on the land is a right in the soil itself, for the growth and nourishment of trees, so long and so far as it may be used for that purpose.[5] But a reservation of the trees to the grantor and his heirs on land granted is limited to the trees then growing, without any limit as to the time of their removal.[6] A reservation of certain parts of the granted premises, "for the use of our mother," is that of a life-estate only.[7]

[1] 1 Wood, Conv. 213.

[2] *Ante*, § 2353.

[3] Hill *v.* Lord, 48 Me. 95; Bridger *v.* Pierson, 45 N. Y. 601, 603; West Point Iron Co. *v.* Reymert, 45 N. Y. 707.

[4] Hornbeck *v.* Westbrook, 9 Johns. 73; 1 Wood, Conv. 228, 230; Seymour *v.* Courtenay, 5 Burr. 2814, 2817; Bean *v.* Coleman, 44 N. H. 542; Keeler *v.* Wood, 30 Vt. 242; Winthrop *v.* Fairbanks, 41 Me. 307; Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 321; Randall *v.* Randall, 59 Me. 338.

[5] Putnam *v.* Tuttle, 10 Gray, 48; Clap *v.* Draper, 4 Mass. 266; White *v.* Foster, 102 Mass. 378.

[6] Putnam *v.* Tuttle, 10 Gray, 49.

[7] Keeler *v.* Wood, 30 Vt. 242.

§ 2365. **A Reservation must be out of the Estate granted**, and not out of another; though, in some peculiar cases, such a reservation may operate in the nature of a grant from the grantee, to charge upon other premises the burden of contributing the means of enjoying what is thus reserved. The grantor, owning a house with a window opening out of the same, and a strip of land adjoining it twenty-five inches wide, conveyed the strip of land to the adjacent owner, reserving the right forever of keeping open the window aforesaid. It was contended, that, by so doing, he reserved also the light and air that came over the grantee's land to said window from beyond this space of twenty-five inches. But it was held that he had not this right; for a grantor could not, by a reservation in his own deed, acquire an easement in his grantee's land, unless the carrying out of the grant, according to the stipulations in the deed, of itself provided the means of giving operation and effect to the reservation therein, and created an obligation on the part of the grantee to suffer him to use it. And the case, put by way of illustration, was as follows: "Suppose A has close No. 2, lying between closes Nos. 1 and 3 of B, and A grants to B the right to lay and maintain a drain from No. 1 across No. 2, thence to be continued through No. 3 to its outlet, and reserves in his deed the right to enter his drain for the benefit of his intermediate close, together with the right and privilege of having the waste water therefrom pass off through the grantee's close, No. 3, forever. In effect, this, if accepted, would secure to the grantor a right in the grantee's land; but we think it would enure by way of implied grant or covenant, and not *strictly* as a reservation."[1]

§ 2366. **Reservations of Rents.** — For the reservation of freehold rents, as well as rents under demises, the reader is referred to former parts of this work for a fuller consideration of the subject, under the heads of estates for years, and rents.

§ 2367. **Conditions** inserted in deeds, restraining or limiting the effect thereof, have been already noticed under the heads of estates upon condition, and conditional limitations; and all that is necessary to add upon the subject here is, that such

[1] Dyer *v.* Sanford, 9 Met. 395. A reservation of all minerals on a lot of land does not include petroleum oil. Dunham *v.* Kirkpatrick, 101 Penn. St. 36.

a clause, if it is to be inserted, properly comes next in order after the *habendum* or *reddendum*. And to show how liberal courts are in construing conditions so as to give effect to deeds, the case of Pierson *v.* Armstrong may be mentioned, where the limitation was to A and his heirs, and if A died without *children* living at his death, then over, and he left one child at his death, it was held to save the condition, and this child took a fee absolute.[1]

[1] 1 Iowa, 295.

CHAPTER CV.

FORMS OF CONVEYANCE — COVENANTS IN DEEDS.

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§ 2368. **Of Covenants generally.** — In ordinary deeds, next to the parts which have thus been considered in detail, are inserted the clauses of covenant in respect to the title to the granted premises. But it must be a deed in effect as well as in form, in order to have the covenants contained in it available; for if the effect of the instrument be that of a will, though in form a deed, as may be the case, no action can be maintained upon a covenant of warranty contained in it.[1] For a full examination of the subject, the reader is referred to the able and exhaustive work of Mr. Rawle upon Covenants for Title. It, however, should be borne in mind, that in the conveyance of real estate, if no covenants are expressed in the deed, there is not, as in the sale and transfer of chattels, a warranty of the title. If the deed contains no covenant, the purchaser is wholly without remedy. The right of the grantee to relief, either in law or in equity, on account of defects or incumbrances in the title, in the absence of fraud, depends solely upon the covenants for title which he has received. But if he have been induced by fraud to accept a title, he may have his remedy.[2] But a vendor will be liable for fraudulent representations as to title, if accompanied with damage, although his deed contains covenants of title.[3]

§ 2369. **Covenants express or implied.** — Covenants in deeds are either *express*, or are *implied* from certain words and forms of expression made use of in them, to which the law has attached an obligation, although not, by their ordinary import, expressing any contract or agreement. Of this character are the words "give," "grant," "demise," and some others,[4] which will be hereafter considered.

§ 2370. **The Usual Covenants.** — The three covenants ordi-

[1] Scott *v.* Scott, 70 Penn. St. 248; Co. Lit. 386 *a*.

[2] Brandt *v.* Foster, 5 Iowa, 292.

[3] Whitney *v.* Allaire, 1 N. Y. 308; Wardell *v.* Fosdick, 13 Johns. 325.

[4] Wms. Real Prop. 365–369; Walk. Am. Law, 381; 1 Wood, Conv. 232; Co. Lit. 384 *a*, n. 332.

narily found in deeds of conveyance in the eastern States are those contained in the form of a deed heretofore given; namely, of seisin and right to convey, against incumbrances, and of warranty. In the English deeds there is a covenant for further assurance, which is also found in deeds in use in some of the middle States, and a covenant of quiet enjoyment. It is said that the covenant of seisin is not in use now in England, being embraced in that of a right to convey; while in the western States, Pennsylvania, and the southern States, the covenant of warranty is not unfrequently the only covenant inserted.[1] In Iowa, a covenant of warranty is held to embrace the whole three above mentioned.[2] It is said that covenants for further assurance are not in general use in this country.[3] In Ohio, the usual covenants are of seisin and warranty.[4] Covenants of seisin, and right to convey, amount to the same thing.[5]

§ 2371. **Construction of Covenants.** — In construing and applying covenants, they are intended not to enlarge but to defend the quantity of estate granted in the deed; so that, if the grant be of less than a fee, a covenant to warrant it to the grantee and his heirs does not enlarge the estate to a fee.[6] But covenants are sometimes resorted to, to aid in construing doubtful grants.[7]

§ 2372. **Of Covenants enlarging an Estate by Estoppel.** — Sometimes a general covenant of warranty to a grantee and his heirs may estop the grantor and his heirs, though the granting words do not, in terms, carry an inheritance without actually enlarging the estate granted; but such covenant does not estop, when the deed shows what estate was intended to be granted, if that is less than a fee.[8]

[1] Wms. Real Prop. 69, and Rawle's note; Caldwell *v.* Kirkpatrick, 6 Ala. 60.

[2] Van Wagner *v.* Van Nostrand, 19 Iowa, 426.

[3] Foote *v.* Burnet, 10 Ohio, 317, 329; Armstrong *v.* Darby, 26 Mo. 517, case of such a covenant. See Funk *v.* Creswell, 5 Iowa, 62; Colby *v.* Osgood, 29 Barb. 339, held to be a covenant that runs with the land.

[4] Walk. Am. Law, 382.

[5] Griffin *v.* Fairbrother, 10 Me. 91, 95; Prescott *v.* Trueman, 4 Mass. 627, 631; Raymond *v.* Raymond, 10 Cush. 134, 140; Brandt *v.* Foster, 5 Iowa, 294. *Contra*, Richardson *v.* Dorr, 5 Vt. 21.

[6] Ross *v.* Adams, 28 N. J. L. 168; Adams *v.* Ross, 30 N. J. L. 509, 510.

[7] Mills *v.* Catlin, 22 Vt. 104.

[8] Shaw *v.* Galbraith, 7 Penn. St. 111; Terrett *v.* Taylor, 9 Cranch, 53; Adams *v.* Ross, 30 N. J. L. 509; Blanchard *v.* Brooks, 12 Pick. 67; Co. Lit. 385 *b*.

§ 2373. **Covenants in Præsenti and in Futuro.** — A marked difference between covenants of seisin and right to convey, and against incumbrances, and of those of warranty, quiet enjoyment, and further assurance, is, that the former are all in the present tense, relating to something being or existing at the time when the covenant is made; while the others relate to something future, and are to guard against the consequences of some future act, or for the performance of some future act which the condition of the title to the estate may require.

§ 2374. **What Covenants run with the Land.** — Two important consequences grow out of this form of the first-named covenants; namely, that, if they are ever broken, the breach is simultaneous with the making of the covenant. If the grantor was then seised, he had made good his covenant, and he had a right to convey; if he was not seised, he had violated his covenant as soon as made, and had no right, at common law, to convey the estate, and nothing passed by the deed. So with incumbrances: these did or did not exist when the deed was made; and if they did, the covenant that they did not was then broken. A further consequence was, that a cause of action was at once created in favor of the covenantee to recover his damages; and this being what in law is called a *chose in action*, the law, as a general proposition, does not allow of its being transferred to another to be taken advantage of by him in his own name. So that a covenant of seisin is not one which can be transferred from one grantee to another grantee of the land in relation to which it is made: in other words, it is not a covenant that runs with the estate. This may be stated as the American doctrine, though differing in some respects from that of the modern English decisions, and, to a certain extent, those of several of the States.[1]

[1] M'Carty *v.* Leggett, 3 Hill, 135; Thayer *v.* Clemence, 22 Pick. 490, 493; Slater *v.* Rawson, 1 Met. 450; Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429, 438; Mitchell *v.* Warner, 5 Conn. 497; Clark *v.* Swift, 3 Met. 390, 392; Bartholomew *v.* Candee, 14 Pick. 167; Rawle, Cov. (3d ed.) 342, n., for American cases; 4 Kent, Com. 471, 472; 1 Smith, Lead. Cas. (5th Am. ed.) 174; Catlin *v.* Hurlburt, 3 Vt. 403, 407; Morrison *v.* Underwood, 20 N. H. 369; Kincaid *v.* Brittain, 5 Sneed, 119, 123; Swasey *v.* Brooks, 30 Vt. 692; Mott *v.* Palmer, 1 N. Y. 573; Wilson *v.* Cochran, 46 Penn. St. 229, 231; Hall *v.* Plaine, 14 Ohio St. 422; King *v.* Gilson, 32 Ill. 354; Hamilton *v.* Wilson, 4 Johns. 72; Donnell *v.* Thompson, 10 Me. 170;

§ 2375. **Anomalous Views on the Covenant of Seisin.** — In the leading English case of Kingdon *v.* Nottle, the covenant of seisin is regarded as one that will run with the land, and may be sued upon by an assignee.[1] And the courts of Indiana have adopted the same doctrine.[2] The same is true of Iowa, where the covenant of seisin is regarded as running with the land. It is, moreover, divisible, so that, if a part of the granted premises be conveyed to a third person, he may recover *pro rata* for a breach. The courts get over the difficulty, that, after the covenant is broken, it becomes a mere chose in action, by assuming that choses in action are assignable by the laws of that State; although they hold, in the same case, that such covenants are divisible, and run with the estate.[3] The courts of Ohio and New Jersey make a distinction between the case of a covenant of seisin, where the covenantor is in possession at the time of making the grant, and where he is not in possession: in the first the covenant runs with the land to a second grantee; in the other it does not.[4] In Illinois, the covenant of seisin runs with the land.[5] The case of Kingdon *v.* Nottle has been subjected to able criticism by two, at least, of the American courts;[6] and the doctrine seems to confound all distinction between covenants of seisin and warranty.

§ 2376. **Covenant of Seisin, when broken.** — Some of our courts, as stated, make a distinction between rightful seisin and actual but wrongful seisin. In the latter case, the covenant becomes one of indemnity, not an undertaking merely, that

Baker *v.* Hunt, 40 Ill. 266; Real *v.* Hollister, 20 Neb. 112; s. c. 29 N. W. Rep. 189; Bowne *v.* Wolcott, 1 N. Dak. 497; s. c. 48 N. W. Rep. 426.

[1] Kingdon *v.* Nottle, 1 Maule & S. 355; s. c. 4 id. 53; Hall *v.* Scott County, 2 McCrary C. Ct. 356. The statute of Maine gives the assignee of a grantee a right to maintain an action upon a covenant of seisin against the covenantor. Rev. Stat. 1883, c. 82, § 18.

[2] Martin *v.* Baker, 5 Blackf. 232; Coleman *v.* Lyman, 42 Ind. 289; Wilson *v.* Peelle, 78 Ind. 384; Wright *v.* Nipple, 92 Ind. 310.

[3] Knadler *v.* Sharp, 36 Iowa, 236; Schofield *v.* Iowa Homestead Co., 32 Iowa, 317. The court cite Kane *v.* Sanger, 14 Johns. 89, where the covenant was for quiet enjoyment; and the court in that case say that "a covenant of seisin, broken the instant it was made, could not be assigned," p. 93.

[4] Backus *v.* McCoy, 3 Ohio, 218, 221; Lot *v.* Thomas, 1 Penning. (2 N. J. L.) 407.

[5] Richard *v.* Bent, 59 Ill. 45.

[6] Mitchell *v.* Warner, 5 Conn. 497, 504; Clark *v.* Swift, 3 Met. 390, 392. See also Moore *v.* Merrill, 17 N. H. 79; Shep. Touch. 170.

the grantor's title is absolutely good, but that the grantee shall be saved harmless if it prove defective, and he is deprived of his estate.[1] And to that extent it has the same operation as a covenant of warranty; which is now the English doctrine.[2]

§ 2377. **Same Subject — Divergent Views.** — In Massachusetts, on the other hand, the court held, in Marston *v.* Hobbs, that to sustain a covenant of *lawful seisin* and *right to convey*, which are regarded as synonymous, it was not necessary that the covenantor should be seised of an indefeasible title, but that a seisin in fact was sufficient, whether he gained it by his own act of disseisin, or was in under a prior disseisor. If, at the time he executed the deed, he had the exclusive possession of the premises, claiming the same in fee-simple by a title adverse to that of the owner, he was seised in fee, and had a right to convey. Nor is it necessary that the grantor in possession should have a legal title.[3] If a covenantee sue the covenantor for a breach of the covenant of seisin, the burden is on him to show that the covenantor was not seised.[4] In Twambly *v.* Henley, this was followed by a ruling, that the covenant of good right to convey amounted to a covenant that the land should pass by the conveyance, and was not broken if the covenantor was, in fact, seised either by wrong or by a defeasible title.[5]

§ 2378. **What sustains a Covenant of Seisin.** — The more recent case of Slater *v.* Rawson not only sustained the doctrine

[1] Backus *v.* McCoy, 3 Ohio, 211, 221; Foote *v.* Burnet, 10 Ohio, 317, 332; Devore *v.* Sunderland, 17 Ohio, 52, 60, affirmed by Betz *v.* Bryan, 39 Ohio St. 322, which cites the line of Ohio cases. The covenant is real and runs, provided the grantor is in actual possession claiming, etc.; otherwise, if he is out of possession and without title. 1 Smith, Lead. Cas. (5th Am. ed.) 174.

[2] Walk. Am. Law, 382, 383.

[3] Beddoe *v.* Wadsworth, 21 Wend. 124; Wilson *v.* Widenham, 51 Me. 567; Griffin *v.* Fairbrother, 10 Me. 95.

[4] Ingalls *v.* Eaton, 25 Mich. 35.

[5] Marston *v.* Hobbs, 2 Mass. 433; Twambly *v.* Henley, 4 Mass. 441; Bearce *v.* Jackson, 4 Mass. 408; Prescott *v.* Trueman, 4 Mass. 627, 631; Raymond *v.* Raymond, 10 Cush. 134, 140; 4 Dane, Abr. 339; Willard *v.* Twitchell, 1 N. H. 177; Lockwood *v.* Sturdevant, 6 Conn. 385; Richardson *v.* Dorr, 5 Vt. 1; Parker *v.* Brown, 15 N. H. 176, 187 (*arguendo*), *contra*. And see Partridge *v.* Hatch, 18 N. H. 498. Chancellor Kent thinks there should be a *legal* seisin in order to satisfy the covenant. 4 Kent, Com. 480, n. (*e*). See Lowry *v.* Tilleny, 31 Minn. 500.

above stated, but established the further doctrine, that if one in actual possession, under a claim of right, conveys land with covenants of seisin and warranty, a seisin thereby passes by the deed, and with it enough of estate to attach to it the covenant of warranty, and that the latter will run with the land to the grantee of such covenantee.[1] From the apparent inconsistency of regarding the covenant of seisin broken as soon as made, and yet holding the deed in which it is contained to convey so much estate in the land as to carry with it the covenant of warranty, it would seem, that, in such a case as Slater *v.* Rawson, the covenant of seisin would be saved. And such seems to be the doctrine maintained, more or less directly, in several of the cases above cited;[2] although Mr. Rawle remarks that "it does not necessarily follow that such a seisin will support a covenant for seisin."[3]

§ 2379. **The Contrary View.**— There is a class of cases which impugn the doctrine maintained in Marston *v.* Hobbs, and some other of the cases above cited, that actual seisin and possession of granted premises by the grantor, when he makes his deed, supports his covenant that he is lawfully seised; and Mr. Rawle says that the doctrine is confined to the States in which the cases arose, and has not passed without contradiction in others.[4] In New Hampshire, the doctrine is severely criticised in the opinion of Parker, Ch. J., in Parker *v.* Brown; and it is maintained that a covenant that one is lawfully seised is not supported by a seisin which may be good against all but the true owner, since it is not a seisin in the party's own right in fee." "Parties, says the chief justice, "not conversant with the law, ordinarily understand this covenant as an assurance of a

[1] Slater *v.* Rawson, 1 Met. 450; 6 id. 439; Beddoe *v.* Wadsworth, 21 Wend. 120; Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429; Cushman *v.* Blanchard, 2 Me. 266, 268; Dickinson *v.* Hoomes, 8 Gratt. 353, 397, expressly affirming Slater *v.* Rawson; Fowler *v.* Poling, 2 Barb. 300, 304; s. c. 6 Barb. 165; Griffin *v.* Fairbrother, 10 Me. 91, 95; 1 Smith, Lead. Cas. (5th Am. ed.) 157; Backus *v.* McCoy, 3 Ohio, 218; Devore *v.* Sunderland, 17 Ohio, 218; Bartholomew *v.* Candee, 14 Pick. 167; Overfield *v.* Christie, 7 S. & R. 177.

[2] Fowler *v.* Poling, 2 Barb. 304, 305; Dickinson *v.* Hoomes, 8 Gratt. 396; Cushman *v.* Blanchard, 2 Me. 269; Willard *v.* Twitchell, 1 N. H. 175; Marston *v.* Hobbs, 2 Mass. 433.

[3] Rawle, Cov. (3d ed.) 53, n. See also 4 Kent, Com. 471 and note.

[4] See Rawle, Cov. (4th ed.) 72, 76 *et seq.*; 4 Kent, Com. 471, note; Kincaid *v.* Brittain, 5 Sneed, 120.

title; and we are of opinion that they have the right so to understand it:" "that the deed may transmit a seisin, in virtue of which, and a possession under it, the grantee may obtain evidence of an indefeasible fee-simple, does not show that the terms of the covenant are fulfilled."[1] If the court mean by the covenant of seisin one of assurance of title, what that term ordinarily implies, it seems to go the whole length of affirming that such covenants run with the land as it is laid down in broad terms that "all covenants concerning title run with the land, with the exception of those that are broken before the land passes."[2] So that, instead of being a covenant *in præsenti*, it is both present and future in its operation, and, in its future operations, is like that of warranty.

§ 2380. **Covenant of Seisin; what embraced and implied therein.** — Much, therefore, must depend, in determining the effect to be given to covenants of seisin, upon the meaning which courts attach to the term. If it is limited to the mere fact of being in possession under a claim of right, then such possession will support it, and the absence of it will be a breach; and the language of a large number of cases is thereby sustained, that the covenant of seisin is broken, if at all, as soon as made. And Mr. Rawle, in reference to the effect of possession in supporting the covenant of seisin, remarks: "There is one point of view from which the construction thus given to this covenant might readily appear to be correct. Since possession, enduring for a sufficient length of time, will, under the limitation acts, ripen into a good title, there would seem reason for holding that such possession should be regarded as an actual estate from the moment of its commencement; and, therefore, that the seisin which this covenant purports to assure might properly be used in its old signification, and not, as has been recently the case, as synonymous with title."[3] Whatever is asserted by the deed to be true, or covenanted

[1] Parker *v.* Brown, 15 N. H. 176, 187; reaffirmed in Partridge *v.* Hatch, 18 N. H. 498. See also Mills *v.* Catlin, 22 Vt. 106; Brandt *v.* Foster, 5 Iowa, 294.

[2] 4 Kent, Com. 473; Rawle, Cov. (4th ed.) 319 *et seq.*; that covenants of seisin do not run with the land, 2 Sugd. Vend. Ham. ed. 458 and note; Griffin *v.* Fairbrother, 10 Me. 95. See Backus *v.* McCoy, 3 Ohio, 219, following Kingdon *v.* Nottle.

[3] Rawle, Cov. (3d ed.) 23, 24. And see Rawle (4th ed.) 69.

therein to be true, as that the covenantor is seised, or lawfully seised, must be true or false at that time, and will not become otherwise by any subsequent event. If, for instance, he is in possession, and covenants that he has a right to convey the estate to another, it is just as true after having been in such possession a month or a year as it would be if this possession had been continued nineteen years and three hundred and sixty days; and if the covenant is broken as soon as made, it is difficult to understand how it can afterwards run with the land through subsequent conveyances to after purchasers as assignees.

§ 2381. **Covenant of Seisin of Indefeasible Estate.** — It seems from the statement of Mr. Rawle, that while, in this country, "seised" and "lawfully seised" are but different forms of the same covenant, and identical in effect,[1] in the early English cases these terms were held to mean the same as "seised of an *indefeasible* estate."[2] The effect of the latter covenant in this country, when expressly made, is uniformly held to extend farther than that of the ordinary covenant of seisin, and to cover an existing outstanding title adverse to that of the grantor. It is intended to meet the case where one is in possession, and his grantee wishes for a remedy, if he shall discover that a third person has a better title, which, for any reason, he does not see fit to enforce by eviction, so as to lay a foundation for an action by the grantee upon his covenant of warranty. The damages in an action upon such a covenant may be merely nominal, as in the case above cited of Garfield *v.* Williams, where the plaintiff had been suffered to enjoy undisturbed possession under his conveyance till his title had become consummated by the statute of limitations.[3] This latter form of the covenant of seisin, though not in general use in this country, is fully recognized in the distinction between its terms and those in which such covenant is usually framed, by many of the cases, a few of which are referred to.[4] *

* Note. — If the covenant of seisin is deemed to be broken by a mere want of title in the grantor, who is in possession under a claim of right, and conveys the

[1] Rawle, Cov. (3d ed.) 20; 4 Dane, Abr. 339.

[2] Rawle, Cov. (4th ed.) 56.

[3] Garfield *v.* Williams, 2 Vt. 328. See Wilson *v.* Forbes, 2 Dev. 30; Bender *v.* Fromberger, 4 Dall. 439; Kincaid *v.* Brittain, 5 Sneed, 123.

[4] Preston *v.* Trueman, 4 Mass. 627, 631; Abbott *v.* Allen, 14 Johns. 248, 252;

§ 2382. **If Grantor out of Possession, Covenant of Seisin is broken at once.** — In one respect the authorities seem to be uniform, and the rule of law the same in all the States, except where the subject is controlled by local statute; and that is, if the grantor has no possession of land, either by himself or by another, where he undertakes to convey it by deed, and enters into a covenant of seisin therein, nothing passes by his deed, and this covenant is broken at once; nor can he be made liable thereon to any assignee to whom his grantee may undertake to convey the estate.[1] And the cases cited below, as well as some others already referred to, state the doctrine as one of general application, that a proper covenant of seisin is broken, if at all, as soon as made.[2]

§ 2383. **Covenant of Seisin — What constitutes Breach.** — It has been held that the existence of an easement or incumbrance upon the land, like a highway, or a mortgage, or an equitable lien, is not such a breach, if possession has not been taken under such mortgage.[3] So the existence of a railroad across land which is conveyed with a covenant of seisin is not

land with the usual covenant of warranty as well as of seisin, and if the grantor's deed conveys the possession so that the grantee may avail himself of it in giving him an estate in the land, it is difficult to see why the covenantor may not be subjected to two actions, if the title fails in the grantee of his vendee, by an entry and eviction by him who has the paramount title, — one in favor of his immediate covenantee upon the covenant of seisin, and the other in favor of the assignee of the covenantee upon the covenant of warranty.

Smith *v.* Strong, 14 Pick. 128; Collier *v.* Gamble, 10 Mo. 467, 472; Raymond *v.* Raymond, 10 Cush. 134, 140; Bender *v.* Fromberger, 4 Dall. 436, 439.

[1] 1 Smith, Lead. Cas. (5th Am. ed.) 159; Slater *v.* Rawson, 1 Met. 450; Devore *v.* Sunderland, 17 Ohio, 60; Greenby *v.* Wilcocks, 2 Johns. 1; Dickinson *v.* Hoomes, 8 Gratt. 397; 4 Kent, Com. 471; Pollard *v.* Dwight, 4 Cranch, 430; Walk. Am. Law, 382; Garfield *v.* Williams, 2 Vt. 327; Bartholomew *v.* Candee, 14 Pick. 170; Mitchell *v.* Warner, 5 Conn. 497; Backus *v.* McCoy, 3 Ohio, 218, 221. See also cases cited *ante*, § 2374.

[2] Rawle, Cov. (4th ed.) 320; Walk. Am. Law, 382; Fowler *v.* Poling, 2 Barb. 303; Cushman *v.* Blanchard, 2 Me. 269; Wilson *v.* Forbes, 2 Dev. 30, 35; Griffin *v.* Fairbrother, 10 Me. 95; Bickford *v.* Page, 2 Mass. 455; Wilson *v.* Cochran, 46 Penn. St. 231; Sayre *v.* Sheffield, L. I. & C. Co., 106 Ala. 440; s. c. 18 So. Rep. 101; Rombough *v.* Koons, 6 Wash. 558; s. c. 34 Pac. Rep. 135; Daisy Realty Co. *v.* Brown, 18 Ky. Law Rep. 155 s. c. 35 S. W. Rep. 637.

[3] Rawle, Cov. (3d ed.) 51; Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429, 437, 439; Whitbeck *v.* Cook, 15 Johns. 483; Reasoner *v.* Edmondson, 5 Ind. 393; Mills *v.* Catlin, 22 Vt. 98, 106.

a breach of such covenant, though it would be of a covenant against incumbrances.[1] But the existence of an outstanding life-estate would constitute a breach; and Mr. Rawle suggests that an outstanding term of years might also have this effect.[2] But it has been held, that if premises, when granted, are in the possession of another as tenant of the grantor, which was known to the grantee at the time the deed was made, such possession is not a breach of the covenants in the grantor's deed. The tenant becomes the tenant of the grantee, and the possession of the tenant becomes his possession.[3] Such would be the case if the quantity of land expressly granted and described is materially less than would answer to such description; at least, such seems to be the rule in South Carolina.[4] And the covenant of seisin would be broken if there were no such land in existence as that described and purported to be conveyed in the covenantor's deed.[5] And, generally, where a part of the thing granted is not owned by the covenantor, but is owned by another;[6] as if one of two tenants in common convey the entire estate with covenants of seisin, the covenant as to one half the estate would be broken at once, and the purchaser might recover back one half the purchase-money.[7] Where one own-

[1] Kellogg *v.* Malin, 50 Mo. 496; Shelbyville & B. T. Co. *v.* Green, 99 Ind. 205; Moore *v.* Johnston, 87 Ala. 220; s. c. 6 So. Rep. 50. A purchaser is presumed to have knowledge of the existence of railways and highways, and so these constitute no breach of the usual covenants in a deed. Smith *v.* Hughes, 50 Wis. 620. See *post*, § 2385. Right to erect a wall upon the granted premises is not a breach of the covenant. Blondeau *v.* Sheridan, 81 Mo. 541.

[2] Rawle, Cov. 52.

[3] Lindley *v.* Dakin, 13 Ind. 388.

[4] Pringle *v.* Witten, 1 Bay, 256. See Kincaid *v.* Brittain, 5 Sneed, 123.

[5] Wheelock *v.* Thayer, 16 Pick. 68, 70; Bacon *v.* Lincoln, 4 Cush. 210; Basford *v.* Pearson, 9 Allen, 389. In Parker *v.* Moore, 118 Mass. 552, the defendant, prior to his conveyance to the plaintiff, released a right of way which up to that time had passed as appurtenant to the estate. The plaintiff sued for a breach of the covenant of seisin, contending that in his deed from the defendant there was such a reference to the previous deeds as to make the subject-matter of the covenant embrace the right of way. The only question considered by the court was, whether, by a fair construction of the deed, it purported to convey the easement. As to the effect of words "with appurtenances" in deed with covenants, see Green *v.* Collins, 86 N. Y. 246; Adams *v.* Conover, 87 N. Y. 422.

[6] Mott *v.* Palmer, 1 N. Y. 564; Brandt *v.* Foster, 5 Iowa, 295; Wilson *v.* Forbes, 2 Dev. 35.

[7] Downer *v.* Smith, 38 Vt. 468.

ing land on which was a spring of water granted to another the right to take the water by pipes and carry it on to other land, and then sold his estate with covenants, it was held that there was thereby a breach of the covenant of seisin in respect to the spring.[1] So if there are buildings, or fences, or other fixtures, standing upon and attached to premises conveyed with covenants of seisin, and these buildings, etc., belong to other persons who have a right to remove them, the covenant of seisin will, if no exception of these is made in the grant, be broken; and the purchaser of the estate may, in an action thereon, recover the value of such buildings and fixtures.[2] But one in possession under a patent, who conveys with covenants of seisin, would not be liable thereon, because such patent was voidable, and with it the title to the premises;[3] and if one purchase of another, with covenants of seisin, lands of which he is himself in possession, and to which he has a good title, and these facts were known to him at the time of taking his deed, he could not recover of his covenantor in an action for a breach of such covenant.[4] [And, generally, a mere cloud or incumbrance which does not defeat the grantor's seisin, such as an inchoate right of dower or a lien, will not constitute a breach.[5]]

§ 2384. **Covenant against Incumbrances.** — Much that has been said of the covenant of seisin, and right to convey, may be applied to the covenant against incumbrances. If there be an incumbrance, the covenant, being *in præsenti*, is broken as soon as made.[6] Accordingly, if the covenant be broken in the lifetime of the covenantee or one holding the covenant, his executor or administrator must sue upon it, and not his heir.[7] In Iowa, though the covenant against incumbrances be *in*

[1] Clark *v.* Conroe, 38 Vt. 469; Lamb *v.* Danforth, 59 Me. 324.

[2] Mott *v.* Palmer, 1 N. Y. 564, 572, case of a fence; West *v.* Stewart, 7 Penn. St. 122, case of a building; Powers *v.* Dennison, 30 Vt. 752; Van Wagner *v.* Van Nostrand, 19 Iowa, 427.

[3] Pollard *v.* Dwight, 4 Cranch, 430, 432.

[4] Fitch *v.* Baldwin, 17 Johns. 161.

[5] Whisler *v.* Hicks, 5 Blackf. 100; Tuite *v.* Miller, 10 Ohio, 382; Lewis *v.* Lewis, 5 Rich. Law, 12; Sedgwick *v.* Hollenback, 7 Johns. 376.

[6] Cathcart *v.* Bowman, 5 Penn. St. 317; Clark *v.* Swift, 3 Met. 392; Fisk *v.* Cathcart, 3 Col. App. 374; s. c. 33 Pac. Rep. 1004.

[7] Frink *v.* Bellis, 33 Ind. 135.

præsenti, if a second or third grantee from the covenantee be called upon to discharge it, in order to protect his title, he may sue and recover upon the covenant what he has been required to pay.[1] The same is the law in Illinois.[2] But incumbrances are so various in their description and character, that the same rule cannot well be applied to all. Some of them, like an existing right of way over the premises, or a permanent easement, are as much incumbrances when the deed is made as they ever can be, and, of course, actually diminish and detract from the value of the estate at that time. Other incumbrances, like an existing right of dower or an outstanding mortgage, may or may not impair the value of the premises conveyed, according as these claims are or are not enforced. The person entitled to dower may die before having it set out, or the mortgagor may pay the mortgage-debt and relieve the estate. If, in the cases first supposed, the covenantee sues upon his covenant, he recovers the damage which the estate sustains by the existence of such a permanent incumbrance; in the other, he can only recover nominal damages until it shall have been ascertained that the widow or mortgagee will enforce their claim, and he has paid or satisfied the same.[3] Suppose that such a grantee conveys the estate to a third person by a deed of quitclaim or other deed not of warranty, and the dower right or mortgage is then enforced for the first time against the last-named purchaser, and regarding the first grantor's covenant, as to these incumbrances, as one *in præsenti:* the second purchaser would be without remedy against him, being a mere assignee of a covenant broken before assignment made. But if he shall be evicted by the enforcement of the widow's or mortgagee's claim, these being paramount titles to his, he may avail himself of the covenant of warranty if there were one

[1] Knadler *v.* Sharp, 36 Iowa, 236.

[2] Richard *v.* Bent, 59 Ill. 45.

[3] Prescott *v.* Trueman, 4 Mass. 627, 629; Thayer *v.* Clemence, 22 Pick. 490, 493; Clark *v.* Swift, 3 Met. 390, 392; Wyman *v.* Ballard, 12 Mass. 304; Tufts *v.* Adams, 8 Pick. 547; Rawle, Cov. (3d ed.) 111–114; id. 347; Whitney *v.* Dinsmore, 6 Cush. 127; Funk *v.* Creswell, 5 Iowa, 62; Andrews *v.* Davison, 17 N. H. 416; Runnels *v.* Webber, 59 Me. 488; Russ *v.* Perry, 49 N. H. 547. But an entry upon the estate for the purpose of foreclosing for a breach of the condition in the mortgage is, without actual ouster, an eviction for which the owner of the equity can recover under the covenant of warranty. Furnas *v.* Durgin, 119 Mass. 500.

contained in the first deed, disregarding altogether that against incumbrances.[1] But this is obviated now by statute in Massachusetts, giving a right of action for a breach of this covenant, in some cases, "to the grantee, his heirs, executor, administrator, successors, or assigns."[2]

§ 2385. **What constitutes an Incumbrance.** — An incumbrance, within the terms of the covenant against them, is said to be "every right to, or interest in, the land, to the diminution of the value of the land, but consistent with the passage of the fee by the conveyance."[3] An inchoate right of dower is an incumbrance within the meaning of the covenant against these.[4] But the fact that the land conveyed is covered with water is not an incumbrance, whether it be by a natural pond or artificial flowing, if done without right by the grantor or a stranger. The remedy of the grantee in such a case is in a different form from an action upon his covenant.[5] In Wisconsin, where one conveyed land with covenant against incumbrances, a part of which was then flowed for the purpose of a mill-pond, which the mill-owner had a prescriptive right to maintain, it was held not to be a breach of the covenant, on the ground "that purchasers of property, obviously and notoriously subjected at

[1] Sprague *v.* Baker, 17 Mass. 586, while Wilde, J., intimates, that, in such a case as is supposed in the text, the purchaser might recover upon the covenant against incumbrances, and clearly might upon covenant of warranty. Tufts *v.* Adams, 8 Pick. 547; Thayer *v.* Clemence, 22 Pick. 490, 494; Whitney *v.* Dinsmore, 6 Cush. 124, 128. In Foote *v.* Burnet, 10 Ohio, 317, 333, the court held that a covenant against incumbrances ran with the land, as, in a former case, they had held was the case with covenants of seisin. Backus *v.* McCoy, 3 Ohio, 211. See also M'Crady *v.* Brisbane, 1 Nott & McC. 104; Fuller *v.* Jillette, 9 Biss. C. Ct. 296, *contra.*

[2] P. S. c. 126, § 18. The statute applies only where the incumbrance is "of record," and this phrase is construed to mean a record in the registry of deeds. So a lien for unpaid taxes, which appears only in town or city records, does not come within the statute. Carter *v.* Peck, 138 Mass. 439.

[3] Prescott *v.* Trueman, 4 Mass. 627, 630; Cary *v.* Daniels, 8 Met. 482; Dugger *v.* Oglesby, 99 Ill. 405; Wilson *v.* Irish, 57 Iowa, 184; McGowan *v.* Myers, 60 Iowa, 256; Fritz *v.* Pusey, 31 Minn. 368 (outstanding lease); Kramer *v.* Carter, 136 Mass. 507 (restriction as to use of land).

[4] Shearer *v.* Ranger, 22 Pick. 447; Jenks *v.* Ward, 4 Met. 412; Fletcher *v.* State Cap. Bank, 37 N. H. 397. But see Bestwick *v.* Williams, 36 Ill. 69; Powell *v.* Monson, etc., Mfg. Co., 3 Mason, C. Ct. 355; Bigelow *v.* Hubbard, 97 Mass. 198; Walker *v.* Deaver, 79 Mo. 664.

[5] Kidder *v.* George, 18 N. H. 512.

the time to some right of easement or servitude affecting its physical conditions, take it subject to that right, without any express exceptions in the conveyance."[1] So is a paramount title; and the existence of such an outstanding title is a breach of this covenant,[2] or an existing lien for taxes.[3] But in Louisiana a vendor is not bound by his warranty in respect to servitudes which are apparent, but would be if they were non-apparent.[4] The court of Maryland adopt the same distinction in case of a grant of an estate, over which another had an easement of light and air by windows opening upon the land granted. But an annotator upon the case impugns the doctrine, because windows might be thus situate without having such easement connected with them.[5] In Pennsylvania the court held a highway across the granted premises, which had existed thirty years, not to constitute an incumbrance within the meaning of the covenants in a deed. But a private way would be an incumbrance.[6] A right of way for a railroad is an incumbrance for which a covenantee may recover, although cognizant of its existence when he took the deed.[7] But, in Kentucky, Wisconsin, Iowa, Virginia, and Pennsylvania, a public highway in use is not deemed an incumbrance in the conveyance of lands.[8] And such is the tendency of the opinion

[1] Kutz *v.* McCune, 22 Wis. 628. A purchaser takes in like manner, with presumed notice of highways and railroads. Smith *v.* Hughes, 50 Wis. 620. But see Messer *v.* Oestreich, 52 Wis. 684.

[2] Cornell *v.* Jackson, 3 Cush. 509.

[3] Long *v.* Moler, 5 Ohio St. 271; Mitchell *v.* Pillsbury, 5 Wis. 407; Cochran *v.* Guild, 106 Mass. 30; Hill *v.* Bacon, 110 Mass. 388; Richard *v.* Bent, 59 Ill. 38; Fuller *v.* Jillette, 9 Biss. C. Ct. 296; Plowman *v.* Williams, 6 Lea (Tenn.), 268; Campbell *v.* McClure, 45 Neb. 608; s. c. 63 N. W. Rep. 920; Gheen *v.* Harris, 170 Penn. St. 644; s. c. 32 Atl. Rep. 1094. A betterment assessment is a lien from the time of passing the order laying the assessment, and is an incumbrance within the meaning of this covenant. Smith *v.* Carney, 127 Mass. 182; Fagan *v.* Cadmus, 46 N. J. L. 441. That a portion of the land has been illegally sold for taxes is no incumbrance. Noyes *v.* Rockwood, 56 Vt. 647. Tax assessed before, but levied after, the covenant is not a breach of it. Barlow *v.* St. Nicholas Nat. Bank, 63 N. Y. 399; s. c. 20 Am. Rep. 547. See Tull *v.* Royston, 30 Kan. 617.

[4] Lallande *v.* Wentz, 18 La. An. 290.

[5] Janes *v.* Jenkins, 34 Md. 11.

[6] Wilson *v.* Cochran, 46 Penn. St. 232; Butler *v.* Gale, 27 Vt. 739; Rawle, Cov. 4th ed. 100, 101; *contra*, Kellogg *v.* Ingersoll, 2 Mass. 101; Rawle, Cov. 4th ed. 100, 104; Patterson *v.* Arthurs, 9 Watts, 154; Russ *v.* Steele, 40 Vt. 310.

[7] Jerald *v.* Elly, 51 Iowa, 321.

[8] Scribner *v.* Holmes, 16 Ind. 142; Butt *v.* Riffe, 78 Ky. 356; Ake *v.* Mason,

of the court of New York.[1] But in Indiana, Alabama, Vermont, Massachusetts, Connecticut, New Hampshire, and Maine, a public highway is an incumbrance, and constitutes a breach of the covenants in a deed of the land over which it exists.[2] A covenant which runs with the land, creating a charge thereon, is also deemed an incumbrance. And it seems that a clause in the grantor's deed, that the grantee, his heirs and assigns, shall maintain a fence along the line of the granted land, is a personal obligation alone, and not an incumbrance binding the estate.[3] But where the grantor covenanted in his deed that he, his heirs and assigns, would maintain a fence along the line of the granted lands, it was a covenant running with the land as a burden and incumbrance, and would be a breach of the grantor's covenant, if he granted the land with covenants.[4]

101 Penn. St. 17 (Sharswood, C. J., and Trunkley, J., dissenting). *Semble*, that the case rests on a statutory definition of warranty. Kutz *v.* McCune, 22 Wis. 628; Smith *v.* Hughes, 50 Wis. 620; Harrison *v.* Des Moines, etc. Co., 91 Iowa, 114; s. c. 48 N. W. Rep. 1081; Jordan *v.* Eve, 31 Gratt. 1.

[1] Whitbeck *v.* Cook, 15 Johns. 483; Tucker *v.* Cooney, 34 Hun (N. Y.), 227.

[2] Kellogg *v.* Ingersoll, 2 Mass. 101; Hubbard *v.* Norton, 10 Conn. 422; Haynes *v.* Young, 36 Me. 561; Lamb *v.* Danforth, 59 Me. 324; Prichard *v.* Atkinson, 3 N. H. 335; Copeland *v.* McAdory, 100 Ala. 553; s. c. 13 So. Rep. 545; Burk *v.* Hill, 48 Ind. 52; Butter *v.* Gale, 27 Vt. 739.

[3] Parish *v.* Whitney, 3 Gray, 516; Plymouth *v.* Carver, 16 Pick. 183; Martin *v.* Drinan, 128 Mass. 515; Kennedy *v.* Owen, 136 Mass. 199.

[4] Bronson *v.* Coffin, 108 Mass. 175, 187. The distinction is between an obligation imposed upon the *grantor* and one laid on the *grantee*. For, in the ordinary deed, it is only the grantor who signs and seals the instrument: the grantee's undertaking is only a parol agreement, evidenced by his acceptance of the deed containing the stipulation which the grantor asks him to assent to. This distinction will be found to harmonize many of the cases which are in apparent conflict. There are, however, numerous decisions in support of the Vermont and New Hampshire cases where the fact that the grantee merely accepts a deed and does not sign or seal it is not accounted of any consequence. In the following cases the obligation (either to fence or do some positive act) was placed upon the grantee, and held to run with the land: Countryman *v.* Deck, 13 Abb. (N. Y.) N. Cas. 110; Georgia Southern R. R. Co. *v.* Reeves, 64 Ga. 492; Hartung *v.* White, 59 Wis. 285. Hammond *v.* Port Royal, etc., Ry. Co., 16 S. C. 567, *contra*. See also Lydick *v.* B. & O. R. R. Co., 17 W. Va. 427.

In Hartung *v.* White, *supra*, a curious distinction is taken. It is said that a covenant to maintain a fence *in esse* runs with the land, whereas a covenant to *build* a fence, where one does not at the time exist, is a personal covenant merely.

In all of the cases following there were covenants throwing burdens upon the grantors: Robbins *v.* Webb, 68 Ala. 393; Hazlett *v.* Sinclair, 76 Ind. 488 (reviews

And it was held in Vermont and New Hampshire, that a similar clause inserted in a deed-poll, to be performed by the grantee, his heirs and assigns, would run with the land granted, and be an incumbrance in the hands of a purchaser from such grantee.[1] Where the maintaining a fence between two parcels is imposed upon one of the owners, he is to construct it of a reasonable and suitable width, height, and materials, and is at liberty to place it in equal parts on each side of the dividing line.[2] A right in the owner of a mill to enter upon the land of another, and clear the channel of the stream, is not an incumbrance upon the premises, but the exercise of a natural right.[3] In Iowa, one of two adjacent owners may set his house so that half the outer wall may stand upon the other's land, to serve as a party-wall ; and if the latter uses it for that purpose, he shall pay one-half the cost thereof. But this liability, though extending to whoever may be the owner when the same shall be used, is not an incumbrance upon the land : it is an incident to the ownership of land.[4] Nor does it affect the rights of the parties claiming under the covenant against incumbrances, that the existence of the incumbrances complained of was known to the covenantee when the conveyance was made.[5] If, when a party grants his estate with covenants against incumbrances, there is a process like partition pending, which is afterwards consummated, and the purchaser is wholly

the authorities), s. c. 40 Am. Rep. 254 ; Fitch *v.* Johnson, 104 Ill. 111 ; Blair *v.* Taylor, 19 Abb. Pr. 228 ; Easter *v.* Little Miami, etc., Co., 14 Ohio St. 448.

It is to be observed that cases may arise where an obligation assumed by a grantee is enforceable against purchasers from him with notice. But *quære* whether such a case could arise and yet not constitute a breach of the covenant, given by said grantee, against incumbrances ? See Kennedy *v.* Owen, 136 Mass. 199, 201, 203. In Lydick *v.* B. & O. R. R. Co., 17 W. Va. 427, the court says that wherever the agreement is such that, had it been under seal and signed by the grantee, it would have run with the land, equity will enforce it.

[1] Kellogg *v.* Robinson, 6 Vt. 276 ; Burbank *v.* Pillsbury, 48 N. H. 475, 482. See Duffy *v.* N. Y. & Harl. R. R. Co, 2 Hilton, 496.

[2] Newell *v.* Hill, 2 Met. 180.

[3] Prescott *v.* Williams, 5 Met. 429.

[4] Bertram *v.* Curtis, 31 Iowa, 49. See Hendricks *v.* Stark, 37 N. Y. 110.

[5] Hovey *v.* Newton, 7 Pick. 29 ; Long *v.* Moler, 5 Ohio St. 271 ; Medler *v.* Hiatt, 8 Ind. 171 ; Snyder *v.* Lane, 10 Ind. 424 ; Kincaid *v.* Brittain, 5 Sneed, 119, 125 ; Funk *v.* Voneida, 11 Serg. & R. 112 ; Harlow *v.* Thomas, 15 Pick. 66 ; *contra*, Kutz *v.* McCune, 22 Wis. 628.

divested of his title, it is a breach of this covenant, and under it he may recover back the purchase-money paid.[1] But the definition is, of course, a general one, embracing a great variety of things which would be accounted incumbrances, many of which are collected by Mr. Rawle; to whose work the reader is again referred.[2] An outstanding condition, which may defeat the title to the estate granted, is not deemed an incumbrance within the meaning of a covenant against incumbrances.[3]

§ 2386. **Covenant of Warranty.** — The broadest and most effective of the covenants contained in American deeds is that of warranty, which is, in some of the States, the only one in general use.[4] It is future in its terms and operation, and runs with the estate, in respect to which it is made, into the hands of whoever becomes the owner of such estate. But, if once broken by an eviction, the covenant of warranty stands upon the same ground as the covenants which are broken as soon as made.[5]

§ 2387. **This Covenant may operate to create Title.** — It is not only a means of obtaining recompense for the loss of the land so held, but it often operates to create a title to land by way of estoppel, even against the grantee of the warrantor, by preventing a party from setting up an otherwise good title to the same;[6] as where one, having no title to land, conveys it, with a covenant of warranty, and afterwards acquires a title to the same, he is estopped to claim the land, and this extends to his second grantee in favor of the covenantee. And, in some cases, an heir is thereby rebutted from claiming, by another and better title, the land which his ancestor had conveyed with warranty, if such heir receives assets from his ancestor, the covenantor, sufficient to make good such warranty.[7] But heirs

[1] Chapel *v.* Bull, 17 Mass. 213; Funk *v.* Creswell, 5 Iowa, 62.

[2] Rawle, Cov. 4th ed. 94 *et seq.*

[3] Estabrook *v.* Smith, 6 Gray, 572, 576. But see Jenks *v.* Ward, 4 Met. 412.

[4] Rawle, Cov. 3d ed. 203.

[5] Wilson *v.* Cochran, 46 Penn. St. 229.

[6] Walk. Am. Law, 383; White *v.* Patten, 24 Pick. 324; Allen *v.* Sayward, 5 Me. 231; Somes *v.* Skinner, 3 Pick. 52; Jackson d. Stevens *v.* Stevens, 13 Johns. 316; Danforth *v.* Murray, 12 Johns. 201; Kimball *v.* Blaisdell, 5 N. H. 533; Terrett *v.* Taylor, 9 Cranch, 53.

[7] Bates *v.* Norcross, 17 Pick. 14, 21; Cole *v.* Raymond, 9 Gray, 217; Torrey *v.* Minor, 1 Sm. & M. Ch. 489.

are affected by an ancestor's warranty only as to land acquired by descent from him, and never as to land acquired by purchase.[1] One thing is to be observed in giving the effect above stated to the covenant of warranty, where no estate passes by the deed, that by means of the estoppel the covenant attaches to the estate as soon as the covenantor acquires it, although until then there was no estate with which it could be held to run.[2]

§ 2388. **Covenant of Warranty same as for Quiet Enjoyment.** — Though the covenant of warranty in a deed is now a personal one, binding the warrantor and his personal representatives, it is important to understand somewhat the nature and character of the remedy for which it has become a substitute. This is principally important when the measure of the recompense for a breach of such covenant is considered. The covenant answering to this in English deeds is that for quiet enjoyment.[3]

§ 2389. **Covenant of Warranty; what constitutes a Breach.** — As synonymous with the covenant for quiet enjoyment, this covenant can be broken only by something equivalent to an eviction or disturbance of possession of grantee.[4] It is not, therefore, broken by an outstanding incumbrance, like an inchoate right of dower. The covenant extends to lawful disturbances only, and not to tortious acts; and if the covenantor do the acts, he must, in order to make it a breach of the covenant, do them under the claim and assertion of a right.[5] To

[1] Oliver *v.* Piatt, 3 How. 412. See Russ *v.* Alpaugh, 118 Mass. 369 for an exhaustive opinion on the subject of rebutter by collateral warranty.

[2] McCusker *v.* McEvey, 9 R. I. 528.

[3] The form of this covenant is as follows: "And that it shall be lawful for the said grantee, his heirs and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter upon, and have, hold, occupy, possess, and enjoy, the said lands and premises hereby conveyed, or intended so to be, with their and every of their appurtenances, and to have, receive, and take the rents, issues, and profits thereof, to and for his and their use and benefit, without any let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of, from, or by him, the said grantor, or his heirs, or any other person or persons whomsoever." Rawle, Cov. 3d ed. 163. By recurring to § 2265 of this work, the reader may see the form of a covenant of warranty, substantially such as is in general use in this country, and can compare the redundancy of terms in the one with the terse brevity of the other. See Funk *v.* Creswell, 5 Iowa, 68.

[4] See *post*, § 2401.

[5] Beebe *v.* Swartwout, 3 Gilm. (Ill.) 162, 181; Bostwick *v.* Williams, 36 Ill. 69,

constitute a breach of this covenant, there must be something tantamount to an eviction. But this may be done by yielding to a better title; though no action can be maintained upon it until the real owner of the estate has done something answering to an eviction of the tenant.[1] So if the covenantee find another in possession under a paramount right, when he takes his deed, he may have an action upon this covenant, without being obliged to subject himself to the hazard of an action of trespass by first entering upon the premises and being ousted.[2]

§ 2390. **What constitutes a Breach, continued.** — But it is not necessary that the act of eviction should affect the whole premises granted. It will be a breach of such covenant if the covenantee is divested of any part of them. Thus, where a house of another person was standing on the land belonging to a grantor, and he sold the land with covenant of warranty, and afterwards the owner of the house removed it, it was held to be a breach of this covenant.[3] Among other instances of what would be a breach of a covenant of warranty would be an existing right in another to draw water from the granted premises by an aqueduct.[4] So is the existence of a public or a private way.[5] So is the right to use a wall standing on the premises as a party-wall.[6] But an existing easement of light

70; Ellis *v.* Welch, 6 Mass. 252; Kimball *v.* Grand Lodge, 131 Mass. 59; Field *v.* Herrick, 14 Ill. App. 181; Kramer *v.* Carter, 136 Mass. 504.

[1] Claycomb *v.* Munger, 51 Ill. 376; McGary *v.* Hastings, 39 Cal. 360; Knepper *v.* Kurtz, 58 Penn. St. 484. Entry by a mortgagee to foreclose for a breach of the condition is an eviction. Furnas *v.* Durgin, 119 Mass. 500. A sale by the State, while holding paramount title, is such hostile assertion thereof that one in possession may abandon the estate and sue his covenantors (Campbell, J., dissenting). Green *v.* Irving, 54 Miss. 450; Hencke *v.* Johnson, 62 Iowa, 555.

[2] Clark *v.* Conroe, 38 Vt. 469. *Contra*, Kortz *v.* Carpenter, 5 Johns. 120. But the text is sustained by Grist *v.* Hodges, 3 Dev. 200; Rawle, Cov. 4th ed. 151 *et seq.* Whether a mere easement can be a breach of warranty, see Rawle, Cov. 4th ed. 100; Wilson *v.* Cochran, 46 Penn. St. 233; Wead *v.* Larkin, 54 Ill. 497.

[3] Funk *v.* Creswell, 5 Iowa, 88; West *v.* Stewart, 7 Penn. St. 122. See also Mott *v.* Palmer, 1 N. Y. 564, where the covenant of seisin was held to be broken by want of title to a fence on the premises conveyed. See further, as to partial eviction, Wallerhouse *v.* Garrard, 70 Ind. 400. *Ante*, § 2383.

[4] Day *v.* Adams, 42 Vt. 510; Clark *v.* Conroe, 38 Vt. 469; Lamb *v.* Danforth, 59 Me. 324.

[5] Haynes *v.* Young, 36 Me. 561; Lamb *v.* Danforth, *supra;* Harlow *v.* Thomas, 15 Pick. 66; Russ *v.* Steele, 40 Vt. 310.

[6] Lamb *v.* Danforth, *supra;* but *contra*, Hendricks *v.* Stark, 37 N. Y. 106.

over the granted premises would not be a breach.[1] No act of a mere stranger, though under a pretence of title which is not a valid one, will operate as a breach of this covenant.[2]

§ 2391. **What constitutes a Breach — Acts of Third Parties.** — It has been held that the exercise of the right of eminent domain by the State, whereby some portion of a purchaser's land is taken, is not a breach of his grantor's covenant of warranty.[3] And in England, where an entry was made upon a lessee, who held under a lease with a covenant for quiet enjoyment against all persons claiming under the lessor, and his property was seized to satisfy an outstanding land-tax, it was held not to be a breach of the covenant.[4] On the other hand, if one having a legal claim seeks to enforce it by expelling the tenant in possession, it is not necessary for the latter to wait for a judgment and actual ouster by process of law. He may yield possession to the paramount title, and claim damages for a breach of the covenant.[5] Thus, in Sprague *v.* Baker,[6] the tenant yielded to the claim of a prior mortgagee without suit. In White *v.* Whitney, the only ouster was by the mortgagee's making an entry upon the premises.[7] So in Tufts *v.* Adams,[8] and in Furnas *v.* Durgin.[9] So where the covenantee suffered the estate, which had been conveyed to him with covenant of warranty, to be sold upon an outstanding mortgage, and purchased it himself at auction, and then sold his bid to another, to whom the officer who made the sale gave the deed, it was held to be such an

[1] Janes *v.* Jenkins, 34 Md. 11.

[2] Rawle, Cov. 4th ed. 145 ; Hale *v.* New Orleans, 13 La. An. 499 ; Norton *v.* Jackson, 5 Cal. 262; Hannah *v.* Henderson, 4 Ind. 174 ; Kincaid *v.* Brittain, 5 Sneed, 124 ; Gleason *v.* Smith, 31 Vt. 293 ; Loughran *v.* Ross, 45 N. Y. 792.

[3] Bailey *v.* Miltenberger, 31 Penn. St. 37, 41 ; Peck *v.* Jones, 70 Penn. St. 85 ; Ake *v.* Mason, 101 Penn. St. 17 ; Harrisburg *v.* Peffer, 84 Penn. St. 295.

[4] Stanley *v.* Hayes, 3 Q. B. 105. See also Ellis *v.* Welch, 6 Mass. 246.

[5] Hamilton *v.* Cutts, 4 Mass. 349, 352 ; Rawle, Cov. 4th ed. 240, 247 ; Clarke *v.* McAnulty, 3 Serg. & R. 364, 372 ; Peck *v.* Hensley, 20 Tex. 673 ; Funk *v.* Creswell, 5 Iowa, 65, 86 ; Loomis *v.* Bedel, 11 N. H. 74 ; Chandler *v.* Brown, 59 N.H. 370 ; Brandt *v.* Foster, 5 Iowa, 297 ; Kellog *v.* Platt, 33 N. J. L. 328 ; Kansas Pacific Ry. Co. *v.* Dunmeyer, 24 Kan. 725 ; Anderson *v.* Buchanan, 20 Neb. 272 ; s. c. 29 N. W. Rep. 935.

[6] Sprague *v.* Baker, 17 Mass. 586. See this limited, Gilman *v.* Haven, 11 Cush. 330.

[7] White *v.* Whitney, 3 Met. 81, 89.

[8] Tufts *v.* Adams, 8 Pick. 547 ; Estabrook *v.* Smith, 6 Gray, 572.

[9] Furnas *v.* Durgin, 119 Mass. 500.

eviction as gave him a right to recover upon his covenant.[1] A judgment in ejectment is not a breach unless followed by an actual ouster.[2]

§ 2392. **This Covenant of Warranty is a Personal One**, and is, in effect, a covenant for quiet enjoyment.[3] As a personal covenant, it may be barred, like any other personal obligation, by the statute of limitations; but such bar would not affect it as an estoppel or rebutter, in its effect upon the title to land in favor of the covenantee.[4] But if, before a breach, the grantor who makes the covenant takes a reconveyance of the estate, it extinguishes the covenant; nor can it be revived by a new conveyance without a new express covenant.[5]

§ 2393. **Covenant of Warranty runs with the Land.** — In the next place, it is a covenant that runs with the estate in reference to which it is made, and may be availed of, by suit in his own name, by any one to whom the same shall come by deed, even after several successive conveyances, or a descent or devise.[6] It is often difficult to distinguish between covenants in gross and such as run with land; but a covenant of warranty seems to be clearly among those that will always run with land.[7] In the first place, there is the requisite privity of estate between the grantor who is the covenantor, and the purchaser or holder of the land in relation to which the covenant

[1] Cawdrey *v.* Coit, 44 N. Y. 382.

[2] Kerr *v.* Shaw, 13 Johns. 236; Webb *v.* Alexander, 7 Wend. 281; Coble *v.* Wellborn, 2 Dev. 388. *Contra*, McAlester *v.* Landers, 70 Cal. 79; s. c. 11 Pac. Rep. 505.

[3] 4 Kent, Com. 472; Caldwell *v.* Kirkpatrick, 6 Ala. 60, 62; Townsend *v.* Morris, 6 Cow. 126; Fowler *v.* Poling, 2 Barb. 300, 303.

[4] Cole *v.* Raymond, 9 Gray, 217. See Holden *v.* Fletcher, 6 Cush. 235.

[5] Brown *v.* Metz, 33 Ill. 339.

[6] Rawle, Cov. 4th ed. 316, 318; Withy *v.* Mumford, 5 Cow. 137; Ford *v.* Walsworth, 19 Wend. 334, 337; White *v.* Whitney, 3 Met. 81, 86; Platt, Cov. 471; Dickinson *v.* Hoomes, 8 Gratt. 353, 396; Booth *v.* Starr, 1 Conn. 244, 246; De Chaumont *v.* Forsythe, 2 Penn. 507, 514; Chase *v.* Weston, 12 N. H. 413; Lawrence *v.* Senter, 4 Sneed, 52; Kellogg *v.* Robinson, 6 Vt. 279; Moore *v.* Merrill, 17 N. H. 81; Slater *v.* Rawson, 1 Met. 450; Chandler *v.* Brown, 59 N. H. 370, citing the text; Cole *v.* Kimball, 52 Vt. 639; Powers *v.* Patten, 71 Me. 583; Allen *v.* Kennedy, 91 Mo. 324; s. c. 2 S. W. Rep. 142.

[7] Conveyance of "right, title, and interest" transmits covenants which the grantor holds from parties preceding him. Powers *v.* Patten, 71 Me. 583. The benefits of covenants pass by sheriff's deed to purchaser at sale on execution. Rawle, Cov. 4th ed. 334. But see Powers *v.* Patten, 71 Me. 583, 587.

is entered into; in the next, the covenant for the title entered into, and formed a part or parcel of the contract by which, and of the consideration for which, the grant of the land was made; and whoever purchases the one is supposed to pay also for the other, and to become thereby substituted in all respects in the place of the first covenantee, so far as the right of being indemnified for any failure by defect of title.[1] *

§ 2394. **Covenant of Warranty — who Entitled to sue for Breach.** — Consistently with the foregoing doctrine, the action for the breach of this covenant should be brought by him who is the owner of the land; and, as such, the assignee of the covenant at the time it is broken.[2] Such covenant is, more-

* NOTE. — Although the subject of covenants running with an estate has been more than once spoken of, it may further be illustrated by examples of a less familiar character than those usually found in the books. Thus one who had laid out a private street from one public street to the land of another proprietor, across his own land, sold a lot bounding upon it, describing it as upon a new way or street now staked out, and to be opened by (the grantor), —— feet wide, extending from M Street along on the northerly side of said lot, etc., westerly to land of, etc. It was held to be a covenant, not only that there was and should be a street along by the lot conveyed, but that it should extend from M Street to the other terminus mentioned; and that it was a covenant running with the land of the grantor, and binding his assignee. So that where the grantor had changed the direction of the street, and then sold the soil of it to one who built upon and obstructed it, at a point remote from the plaintiff's premises, he had a right of action therefor against the party causing such obstruction. Thomas *v.* Poole, 7 Gray, 83. See also Killion *v.* Kelley, 120 Mass. 47; Baltimore *v.* White, 62 Md. 362; McDonald *v.* McElroy, 60 Cal. 495, where covenant that a way on which granted premises bounded should forever be and remain free and open as a public street was held to be either a covenant of seisin or of warranty, — not decided which; Loring *v.* Otis, 7 Gray, 563. A covenant, on the part of the grantee of an estate, to maintain a boundary-fence along the side of the premises, is one that runs with the land, and binds subsequent owners claiming under him. Kellogg *v.* Robinson, 6 Vt. 276; Duffy *v.* N. Y. & Harlem R. R., 2 Hilton, 496; Bally *v.* Wells, 3 Wils. 45; Hartung *v.* White, 59 Wis. 285. Parish *v.* Whitney, 3 Gray, 516; Toledo, St. L. & K. C. R. Co. *v.* Cosaud, 6 Ind. App. 222; s. c. 23 N. E. Rep. 251; Lake Erie & W. R. Co. *v.* Power, 15 Ind. App. 179; s. c. 43 N. E. Rep. 959; Kennedy *v.* Owen, 136 Mass. 199, *contra*. For a case where an agreement restricting the use of premises was held to run with the land, and yet where the court would not specifically enforce it, because of altered circumstances, see Columbia College *v.* Thacher, 87 N. Y. 311, s. c. 41 Am. Rep. 365.

[1] Hurd *v.* Curtis, 19 Pick. 459.

[2] Kane *v.* Sanger, 14 Johns. 89, 93; Bickford *v.* Page, 2 Mass. 455, 460; 1 Smith, Lead. Cas, 5th Am. ed. 163, 164. See Niles *v.* Sawtell, 7 Mass. 444; Ford *v.* Walsworth, 19 Wend. 334, 337; Wheeler *v.* Sohier, 3 Cush. 219, 222;

over, susceptible of divisions into as many parts or interests as the land itself shall be divided into by subsequent successive conveyances; so that, if A convey to B two parcels by one deed with a covenant of warranty, and B sells one of them to C, who is evicted by an elder title of the parcel so purchased by him, he may have covenant in respect to the same against A.[1] Even if one were to convey with covenant of warranty a parcel of land then under mortgage to another, and his grantee were to convey this right of redemption, or it was conveyed by a sheriff upon execution against him, the purchaser, as assignee thereof, may have an action upon the covenant of warranty, if evicted by the mortgagee, or, as it would seem, by any one having a paramount title.[2] Nor would it make any difference in the rights of a subsequent purchaser, as assignee of a covenant running with the land, that his immediate grantor warranted the same to him in his deed.[3] So it was held to be no bar to an action by covenantee against covenantor, upon a covenant of warranty, that the former, when he purchased the estate, gave the latter a mortgage upon the same for a part of the purchase-money which is now outstanding. It would only go to affect the amount of damages.[4]

§ 2395. **When Subsequent Warrantor may recover from Previous.** — An exception, however, to the rule above stated, as to the party to sue for a breach of the covenant of warranty, exists, where the covenantee has himself conveyed the premises with warranty, and his grantee, upon being evicted, sues and recovers of him, instead of suing the original covenantor, as he might have done. In such a case, the first covenantee,

Griffin *v.* Fairbrother, 10 Me. 81; Thompson *v.* Sanders, 5 Mon. 357; Chase *v.* Weston, 12 N. H. 413; Wilson *v.* Peele, 78 Ind. 384; Ladd *v.* Noyes, 137 Mass. 151; Wallace *v.* Vernon, 1 Kerr (N. B.), 5, 24; 4 Kent, Com. 471, 472; Provident L. & T. Co. *v.* Seidel, 147 Pa. St. 232; s. c. 23 Atl. Rep. 560.

[1] 2 Sugd. Vend. Hamm. ed. 508; Dickinson *v.* Hoomes, 8 Gratt. 353, 406; Kane *v.* Sanger, 14 Johns. 89, 94; Fields *v.* Squires, Deady, 366; s. c. Fed. Cases, No. 4776; Dougherty *v.* Duvall's Heirs, 9 B. Mon. 57. See 3 Prest. Abst. 57, 58, *contra.*

[2] White *v.* Whitney, 3 Met. 81; Redwine *v.* Brown, 10 Ga. 311, 320; Brown *v.* Metz, 33 Ill. 339; Devin *v.* Hendershott, 32 Iowa, 192.

[3] Withy *v.* Mumford, 5 Cow. 137; De Chaumont *v.* Forsythe, 2 Penn. 507, 514; Markland *v.* Crump, 1 Dev. & B. 94.

[4] Davis *v.* Judd, 6 Wis. 85; *vide post*, § 2414.

upon satisfying the claim of the second, is remitted to his claim against his covenantor upon the original covenant. And this would be true if there had been a succession of conveyances with warranty on the part of any one or more of the successive grantors: the tenant who is evicted may, in such case, sue any prior covenantor;[1] and if he elects any one but the first, and obtains satisfaction for his claim, such covenantor may thereby stand, as to any prior covenantor, in the place he held before he had parted with the estate, and sue upon his covenant as if the breach had occurred during his ownership.[2]

§ 2396. **Of vouching in Prior Warrantors.** — In order to save a succession of suits in such cases, one who is sued in an action upon his covenant of warranty may vouch in, as it is called, his warrantor, and he in turn may vouch in his; and a judgment in such action will be binding upon the rights of any such previous warrantor, so far as the subjects-matter tried in such suit are concerned, who has been properly vouched or summoned in to take the defence of the suit, whether he has done so or not. But it must appear that the same question between the same parties was put in issue and decided, to have the first judgment conclusive in the trial of the second action.[3] Nor is it essential that these notices should be matters of record.[4] But a covenantee, if sued by one claiming the land, need not call in his warrantor to defend the suit;[5] though, if the plaintiff in such suit recover, the warrantor, when sued, may controvert the title under which the claimant prevailed: but if the covenantee, when sued, give seasonable and actual notice to his warrantor of the suit, and the demandant recovers in such suit, the covenantor would be bound by the judgment

[1] Andrews *v.* Appel, 22 Hun (N. Y.), 429.

[2] Withy *v.* Mumford, 5 Cow. 137; Thompson *v.* Shattuck, 2 Met. 618; Suydam *v.* Jones, 10 Wend. 184; Thompson *v.* Sanders, 5 Mon. 357; Booth *v.* Starr, 1 Conn. 244, 249; Markland *v.* Crump, 1 Dev. & B. 94; Redwine *v.* Brown, 10 Ga. 311, 317.

[3] Belden *v.* Seymour, 8 Conn. 309.

[4] Chamberlain *v.* Preble, 11 Allen, 373; Boston *v.* Worthington, 10 Gray, 498; Littleton *v.* Richardson, 34 N. H. 187; Rawle, Cov. 4th ed. 221; Andrews *v.* Gillespie, 47 N. Y. 487; Stearns, Real Act. 136; Andrews *v.* Denison, 16 N. H. 473; Andrews *v.* Davison, 17 N. H. 413.

[5] Boyle *v.* Edwards, 114 Mass. 373.

therein, and be estopped to deny its validity.[1] In one case, a grantor conveyed with warranty, and a third party claimed the right to maintain a drain across the granted premises. The grantee interrupted this use, and the third party sued him for so doing. He gave notice to the grantor, who failed to defend; and the grantee, upon trial, was held to pay damages. In an action upon the covenant, he recovered the damage to his land of having to permit such a drain, and the damages and costs recovered in the former suit.[2] So where a vendor is sued upon his covenant against incumbrances, if he hold a like deed with covenants from his grantor, and the incumbrance be an existing one at the time of both conveyances, he may vouch in his covenantor, and thus bind him by the judgment against himself in the action.[3]

§ 2397. **Warrantor must have paid to recover from Prior Warrantor.** — But a covenantee who has parted with his estate to a second grantee with warranty cannot recover of his covenantor upon his covenant until he shall have satisfied his own covenantee for his damages, so that the first covenantor may not be liable to be twice charged.[4]

§ 2398. **Who can release Covenant of Warranty.** — It may be added, as a kind of corollary to what has gone before, that no one can release or discharge a covenant of warranty except the one who then holds the title to the estate, and that such discharge can only affect such subsequent purchasers as have notice of the same when purchasing the estate.[5] A release by the covenantee to the covenantor, after he has parted with his estate, will have no effect upon the covenant. But, so long as the covenantee retains the estate, a release by him to the covenantor will be binding upon them; but, in order that it should bind the grantee of the covenantee, who becomes such after

[1] Claycomb *v.* Munger, 51 Ill. 377; Somers *v.* Schmidt, 24 Wis. 417; Smith *v.* Sprague, 40 Vt. 43; Merritt *v.* Morse, 108 Mass. 276.

[2] Smith *v.* Sprague, 40 Vt. 43.

[3] Andrews *v.* Davison, 17 N. H. 416. Where the breach occurs after the estate of a covenantor has been fully settled, the covenantee may sue the heirs directly, and they will have to respond to the extent of assets descended. Walker *v.* Deaver, 79 Mo. 664.

[4] Wheeler *v.* Sohier, 3 Cush. 222, 223; Booth *v.* Starr, 1 Conn. 244; Markland *v.* Crump, 1 Dev. & B. 94.

[5] Leighton *v.* Perkins, 2 N. H. 427.

such release, it must be done by a deed duly recorded, or the grantee should have notice of it before he becomes purchaser.[1]

§ 2399. **Of Warranties restricted by their Terms or the Subject-Matter of the Grant.** — The covenant of warranty thus far discussed has been the general covenant against the lawful adverse claims of all persons. It does not extend to any pretence of claim or title which has no legal foundation.[2] But this covenant may be, and often is, limited and restricted to certain persons, or to certain claims.[3] Thus it is very common to insert in American deeds of quitclaim a covenant against all persons claiming by, through, or under the grantor. In this case the covenant does not stand in the way of the grantor's claiming the land against his own covenantee, under and by virtue of a title acquired after the making of his own deed.[4]

§ 2400. **Same Subject.** — So the extent of the covenant of warranty is often limited and defined by the subject-matter of the grant; as where the deed only purports to convey the right, title, and interest of the grantor.[5] And where the grant is thus limited and restricted in its terms, the covenant of warranty is alike restricted; although the grantor covenants that he is seised in fee of the premises, that they are free of all incumbrances, and that he will warrant them to the grantee against the lawful claims of all persons: the "premises," in

[1] Rawle, Cov. 4th ed. 353, 354; Devin *v.* Hendershott, 32 Iowa, 192; Field *v.* Snell, 4 Cush. 504; Brown *v.* Staples, 28 Me. 500.

[2] Gleason *v.* Smith, 41 Vt. 296.

[3] Bohon *v.* Bohon, 78 Ky. 408. Not qualified by reference to a prior deed in which the premises are said to be subject to a mortgage. Powers *v.* Patten, 71 Me. 588. See Shanahan *v.* Perry, 130, Mass. 460.

[4] Comstock *v.* Smith, 13 Pick. 116; Rawle, Cov. 4th ed. 396; Trull *v.* Eastman, 3 Met. 124; Allen *v.* Sayward, 5 Me. 227; Buckner *v.* Street, 1 Dill. C. Ct. 248; New Orleans, etc. R. R. Co. *v.* Jourdain, 34 La. Ann. 648. The covenant in Kimball *v.* Blaisdell, 5 N. H. 533, though in substance like the above, was held to be equivalent to a general warranty, so far as to estop the grantor owing to the peculiar circumstances of the case.

[5] Blanchard *v.* Brooks, 12 Pick. 47, 67; Raymond *v.* Raymond, 10 Cush. 134, 140; Sweet *v.* Brown, 12 Met. 175; Allen *v.* Holton, 20 Pick. 458; Hall *v.* Chaffee, 14 N. H. 215, 226; Gee *v.* Moore, 14 Cal. 474; Kimball *v.* Semple, 25 Cal. 452; White *v.* Brocaw, 14 Ohio St. 344; Wight *v.* Shaw, 5 Cush. 56; Brown *v.* Jackson, 3 Wheat. 452; Adams *v.* Ross, 30 N. J. L. 510; Potts *v.* Dowdall, 3 Houst. 380; Leonard *v.* Adams, 119 Mass. 367.

the case supposed, being what are included in the granting terms of the deed; viz., "the right, title, and interest."[1] So where one holding an equity of redemption, which had been conveyed to him by W., granted the estate and title which W. had conveyed to him, by metes and bounds, with covenants of warranty, it was held not to warrant the title against the mortgage.[2] And where A conveyed to B a certain parcel of land subject to a certain mortgage, and covenanted that he was seised, and that it was free of incumbrances, it was held that these covenants were limited and qualified by the exception, and that the existence of that mortgage was not a breach of the covenant.[3] The court of Iowa, recognizing the doctrine as here stated, makes a distinction between a grant of a specific parcel of land, and a recital that the grantor thereby intends to convey the grantor's right, title, and interest; and this is followed with a general covenant of warranty, and a grant of his right, title, and interest only. In the first, his covenant would extend to the title of the land, and bind him if it should fail: in the other, it is limited to the subject-matter of the grant; viz., to just what interest the grantor had in the premises.[4] Thus if one "sells, conveys, and quit-claims" a certain parcel of land, and "covenants to warrant and defend" the same, and the title fails in the grantee, the covenantor would be liable upon his covenants.[5] So it is held in Minnesota.[6] In the case of Blanchard *v.* Brooks, the grant was of "all the right, title, interest, and estate," etc. The warranty was a general one against all persons, except those claiming under a certain mortgage. The court held that this was only a warranty "of the premises, that is, of the estate granted, which was all his right, title, and interest." The cases

[1] Hoxie *v.* Finney, 16 Gray, 332; McNear *v.* McComber, 18 Iowa, 12; Freeman *v.* Foster, 55 Me. 508; Bates *v.* Foster, 59 Me. 157; Merritt *v.* Harris, 102 Mass. 328; Blodgett *v.* Hildreth, 103 Mass. 488; Van Rensselaer *v.* Kearney, 11 How. 325, 326.

[2] Bates *v.* Foster, 59 Me. 157.

[3] Freeman *v.* Foster, 55 Me. 508, in which the distinction is made between this and the case of Estabrook *v.* Smith, 6 Gray, 572.

[4] McNear *v.* McComber, 18 Iowa, 14. In Bark *v.* Bark, 64 Ga. 632, the grantor conveyed his interest in certain lands, "said interest containing eighty-three acres, more or less," with a general warranty.

[5] Williamson *v.* Test, 24 Iowa, 139.

[6] Hope *v.* Stone, 10 Minn. 152.

cited below seem to hold, without qualification, that the thing warranted in such a deed is the land itself, and not simply the right and title of the grantor.[1]

§ 2401. **What may be treated as an Eviction.** — The mere existence of a superior title in another, which has never been enforced, cannot amount to a breach of this covenant.[2] The tenant must be disturbed; he must be evicted; but he need not be evicted by legal process: it is enough that he has yielded possession to the rightful owner; or, the premises being vacant, that the rightful owner has taken possession.[3] In New Jersey it is said that there must be an ouster by means of the prosecution and operation of legal measures.[4] But the case seems to leave it doubtful whether it is necessary that these proceedings should be under a judgment of court.[5] But where one, on the first day of May, made a deed with covenant of warranty, and the premises were sold upon a tax subsequently assessed as of the first of May, it was held to be

[1] Mills *v.* Catlin, 22 Vt. 104; Funk *v.* Creswell, 5 Iowa, 66; Loomis *v.* Bedel, 11 N. H. 74; Rowe *v.* Heath, 23 Tex. 614. See also Hubbard *v.* Apthorp, 3 Cush. 419.

[2] Bramble *v.* Beidler, 38 Ark. 200; Montgomery *v.* Reed, 69 Me. 510; Howard *v.* Maitland, 11 Q. B. D. 695. No laches in delaying suit until the plaintiff has been damnified. Post *v.* Campau, 42 Mich. 90. *Semble*, that there may be successive breaches. Ibid. Scriver *v.* Smith, 30 Hun (N. Y.), 129.

[3] St. John *v.* Palmer. 5 Hill, 599; Fowler *v.* Poling, 6 Barb. 165, 171; Hamilton *v.* Cutts, 4 Mass. 349; Beebe *v.* Swartwout, 8 Ill. 162, 179; Estabrook *v.* Smith, 6 Gray, 572; Peck *v.* Hensley, 20 Tex. 673; Stipe *v.* Stipe, 2 Head, 169; Bostwick *v.* Williams, 36 Ill. 69; Home Life Ins. Co. *v.* Sherman, 46 N. Y. 373; Green *v.* Irving, 54 Miss. 450; Ware *v.* Lithgow, 71 Me. 62. The vendee may purchase an outstanding title, and recover the cost. Snell *v.* Iowa Homestead Co., 59 Iowa, 701; Mooney *v.* Blanchard, 84 Ind. 285. See Kansas Pacific Ry. Co. *v.* Dunmeyer, 24 Kan. 725; Isele *v.* Arlington Five Cents Saving Bank, 135 Mass. 142; Ward *v.* Ashbrook, 78 Mo. 515 (dower, inchoate at date of the deed); Walker *v.* Deaver, 79 Mo. 664 (dower); Rex *v.* Creed, 22 W. Va. 373; Rinehart *v.* Rinehart, 91 Ind. 89 (suffering taxes to remain unpaid); Sheffey *v.* Gardiner, 79 Va. 313; Pryse *v.* McGuire, 81 Ky. 608; Douglass *v.* Hoppaugh, 46 N. J. L. 114; Snyder *v.* Jennings, 15 Neb. 372; McInnis *v.* Lyman, 62 Wis. 191.

[4] Stewart *v.* Drake, 9 N. J. L. 139, 141. See also Adams *v.* Conover, 22 Hun (N. Y.), 424.

[5] For a collection of cases showing what circumstances do or do not amount to an ouster, see a note by Mr. Wilcox to 10 Ohio, 317, 335. Sheetz *v.* Longlois, 69 Ind. 491; McInnis *v.* Lyman, 62 Wis. 191; Adams *v.* Connover, 87 N. Y. 422. If grantee has bought a prior mortgage, he need not foreclose, but may recover under his covenants of warranty. Roger *v.* Foster, 62 Iowa, 321.

such an eviction as to work a breach of the covenant, upon the ground that such tax was a lien on the estate.[1]

§ 2402. **Title of the Evicter.** — As a general proposition, it is necessary, in order to a recovery upon a breach of a covenant of warranty, that the tenant claiming under the grant should have been evicted by an elder and better title than that which he derives from his warrantor.[2] But an eviction under a deed made by the warrantor, after the deed in which he had covenanted to warrant the land, was held to be a breach of such covenant. This is regarded by Mr. Rawle as a breach of the covenant for quiet enjoyment, which extends to all acts of the covenantor himself, whether tortious or otherwise.[3]

§ 2403. **Covenant for further Assurance.** — There is a covenant for further assurance, usually inserted in English deeds, but rarely in those in use in this country, which is resorted to, when inserted, rather as a means of enforcing a specific performance of the grantor's agreement to make a good title than as the ground of a suit at law for its breach.[4]

§ 2404. **Of Implied Covenants.** — The subject of implied covenants in leases has been treated in a former part of this work.[5] The word "give" is one of the words from which, when used in a deed of feoffment, the law implies a covenant; the extent of which is a covenant of warranty during the life of the grantor.[6] But in deeds under the statute of uses, the expression implies no covenant;[7] nor does the word "grant."[8]

[1] Hill *v.* Bacon, 110 Mass. 388.

[2] Davis *v.* Smith, 5 Ga. 274; s. c. 48 Am. Dec. 279; Barry *v.* Guild, 126 Ill. 439; s. c. 18 N. E. Rep. 759; s. c. 2 L. R. A. 334.

[3] Rawle, Cov. (4th ed.) 135; Curtis *v.* Deering, 12 Me. 499; Funk *v.* Creswell, 5 Iowa, 66. In an early case in Massachusetts, the deed of a grantee having been accidentally burned before record, his grantor conveyed the same to a second purchaser, whereby the first lost his estate. Wishing to recover the purchase-money which he had paid for the estate, the court held that *case*, and not *assumpsit* for money had, etc., was the form of the action to be adopted. Curtis *v.* Nightingale, Quincy, 256.

[4] Rawle, Cov. 195; Platt. Cov. 353; Colby *v.* Osgood, 29 Barb. 339.

[5] *Ante*, § 668 *et seq.*

[6] Frost *v.* Raymond, 2 Caines, 188; Kent *v.* Welch, 7 Johns. 258; Stearns, Real Act. 123–126.

[7] Allen *v.* Sayward, 5 Me. 227; Bates *v.* Foster, 59 Me. 157; Rawle, Cov. 460.

[8] Platt, Cov. 47, 48; Frost *v.* Raymond, 2 Caines, 188; Co. Lit. 384 *a*, n. 332; Phillips *v.* Hudson, 31 N. J. Law, 151.

It will be found, however, that, by statute in many of the States, certain expressions in the conveying clause imply covenants. For these, the reader is referred to the compilation of statutes heretofore given.[1]

§ 2405. **Implied Covenant in Deed of Exchange.** — But upon an exchange of real estate which is a proper *escambium*, where the word "exchange" is contained in the deeds, there is a warranty of law incident to it, — a condition to give the party a re-entry as well as a warranty, to enable him to vouch and recover over in value.[2] But if the exchange is effected by mutual deeds of bargain and sale with covenants, the remedy of the party is not by re-entry, but upon the covenants in the deed.[3]

§ 2406. **Of Express and Implied Covenants in same Deed.** — There may be both express and implied covenants in a deed, and both be good.[4] But an express covenant always supersedes or controls an implied one, when it relates to the same subject-matter of covenant.[5] This can best be illustrated by a few out of the many cases found in the books. Thus, in one, the covenant was that the covenantee should have the estate "as his own right, etc., free from the claims of all persons whomsoever, to claim the same, or any part thereof, lawfully." Then followed a clause binding the grantor, etc., to warrant and forever defend the right and title to the land against all legal claims, in virtue of a certain patent. It was held, that the first was a general covenant of warranty, and that it was not limited or restricted by the special covenants. They both were to stand together.[6] So where the words in the deed were "grant, bargain, and sell," which are held in Illinois to constitute an express covenant, and these were followed by an express covenant that the heirs, executors, administrators, and assigns should defend the title against all persons, it was held not to limit the general express covenant which preceded it.[7]

[1] *Ante*, note at the end of chapter c.

[2] Bixler *v.* Gaylor, 68 Penn. St. 148; Dean *v.* Shelly, 57 Penn. St. 427.

[3] Gamble *v.* McClure, 69 Penn. St. 284.

[4] Gates *v.* Caldwell, 7 Mass. 68, 70.

[5] Kent *v.* Welch, 7 Johns. 258; Vanderkarr *v.* Vanderkarr, 11 Johns. 122; 4 Cruise, Dig. 370; Line *v.* Stephenson, 5 Bing. N. C. 183.

[6] Rowe *v.* Heath, 23 Tex. 614.

[7] Hawk *v.* McCullough, 21 Ill. 220, 222. See also Funk *v.* Voneida, 11 Serg. & R. 109.

In Mississippi, however, where the same words are held to create an implied covenant, a grantor, after making use of these, added an express covenant to warrant and defend the premises against the claims of all persons. The covenantee sued his covenantor for a breach of covenant of seisin, on the ground that such covenant was implied in the words "grant, bargain, and sell." But the court held, that the express covenant of warranty did away the covenant implied by the words aforesaid, which were intended to operate as covenants only where the parties had omitted to insert covenants in their deed.[1] In Missouri, the court sustain the above doctrine of the courts of Illinois and Pennsylvania, and add, "Whilst it is conceded that a special covenant will restrain a general one, where the two are absolutely irreconcilable, yet the courts have inclined very much to let both stand." "Where the particular covenants and the general covenants are entirely independent of each other, and of a different character, they will all stand."[2] So in Iowa, where the grantor's deed contained the words "grant, bargain, and sell," a covenant was added to warrant and defend the premises against all persons claiming under him. It was held, that the former words amounted to an express covenant; and that the latter covenant did not restrict their effect, though practically superfluous in its effect.[3]

§ 2407. **How far a Restriction of one Covenant affects others.** — From the introduction of several covenants into the same deed, questions have arisen how far a restriction or limitation as to one of these, on the part of the covenantor, extends to and affects the other covenants. The cases are somewhat numerous, and not easily reconciled. Thus where a grantor covenanted, first, that, notwithstanding any act by him to the contrary, he was seised in fee, and, second, that he had good right to convey, etc., it was held, that, though general in its terms, the limitation of the first extended to the second covenant. So where exceptions have been made in a covenant against incumbrances, of a certain mortgage, for instance, and this has been followed by a general covenant of warranty, the

[1] Weems *v.* McCaughan, 7 Sm. & M. 422.
[2] Alexander *v.* Schreiber, 10 Mo. 460, 466.
[3] Brown *v.* Tomlinson, 2 Greene (Iowa), 525.

question has been made, whether the exception as to the one extended to and limited the effect of the other. And this was the case of Estabrook *v.* Smith, cited below. The question in such cases can ordinarily be determined only by construing the several covenants in their relation to each other, in order to reach the meaning which the law gives to the language of the parties. The rule seems to be, that, in order to have the restriction or limitation annexed to the first affect the second in the like manner, the two covenants must be connected; they must be of the same import, and they must be directed to one and the same object; so that in the case stated of a qualified covenant as to incumbrances, with a general covenant of warranty, the latter was held not to be restricted or limited in its effect by the limitations of the first.[1] Thus where the prior covenant in a deed was, that the grantee should hold the premises free from the claims of all persons whomsoever, and was succeeded by one warranting the premises against all legal claims, "in virtue of said C's patent and deed to me," it was held, that the general warranty was not restricted by the limited terms of the second covenant.[2] But where a collector of taxes sold an estate as such, and covenanted, in his capacity of collector, to warrant and defend the granted premises, it was held, that, as he followed the statute form of conveyance, his covenant was not to be regarded as personal, but made in his public capacity. Had he made the sale as executor or administrator, acting *in alieno jure*, any covenants he should have made would have bound him personally.[3] So where the grantor first recited in his deed a declaration of good and full power to sell and dispose of the tract, followed by a covenant to warrant and defend, etc., "all our right, title, claim, etc., against the just claims of all persons," it was held to amount to general covenant of warranty.[4] And in Cornell *v.* Jackson,

[1] Estabrook *v.* Smith, 6 Gray, 572, 577; 2 Sugd. Vend. 527 *et seq.*; Sumner *v.* Williams, 8 Mass. 162, 202, 214; Browning *v.* Wright, 2 Bos. & P. 13; Howell *v.* Richards, 11 East, 634; Smith *v.* Compton, 3 Barn. & Ad. 189; Howell *v.* Richards, 11 East, 633; Gainsford *v.* Griffith, 1 Saund. 51; Smith *v.* Compton, 3 Barn. & Ad. 189.

[2] Rowe *v.* Heath, 23 Tex. 614.

[3] Wilson *v.* Cochran, 14 N. H. 399. See Sumner *v.* Williams, 8 Mass. 162.

[4] Peck *v.* Hensley, 20 Tex. 673.

where there were covenants of seisin against incumbrances and warranty, with a clause expressly limiting the covenants against incumbrances and warranty to the land within certain points, it was held that the covenant of seisin was not thereby limited or restricted to this portion of the premises.[1]

§ 2408. **Grantee's implied Covenant to assume Mortgage.** — Of the nature of the foregoing inquiry is the question which sometimes arises under a grant, where there is an outstanding charge like a mortgage upon the premises, and the same are described as being under such charge or mortgage, whether the purchaser thereby assumes, in law or equity, a personal obligation to pay the same. The case is fully considered in Stebbins *v.* Hall, where it is held that in order to charge such purchaser personally, the language of the deed should be "subject to the payment" of the outstanding mortgage, or that "it forms a part of the purchase-money which the grantee in the deed assumes to pay," or some equivalent expression, which clearly imports that an obligation is intended to be created by one party, and is knowingly assumed by the other.[2] If the purchaser takes his deed subject to the payment of an outstanding mortgage, "with interest thereon," he is obliged to pay accrued interest, as well as that which accrues after his deed.[3]

§ 2409. **Implied Warranty of Quantity.** — Sometimes a certain number of acres or quantity of land in the granted premises is intended to be guaranteed or assured to the grantee, and words to that effect have been held to amount to a covenant. The question in the numerous cases which have arisen has been, whether the reference to quantity is a part of the description of what is intended to be granted, or intended as an assurance of the quantity mentioned. It may be stated, generally, that where the number of acres is referred to as an "esti-

[1] Cornell *v.* Jackson, 3 Cush. 506, 508; Funk *v.* Voneida, 11 Serg. & R. 109; Alexander *v.* Schreiber, 10 Mo. 460.

[2] Stebbins *v.* Hall, 29 Barb. 524; Tillotson *v.* Boyd, 4 Sandf. 516; Murray *v.* Smith, 1 Duer, 412; Trotter *v.* Hughes, 2 Vt. 74; *ante*, §§ 1048, 1138; Gage *v.* Brewster, 31 N. Y. 221; Belmont *v.* Coman, 22 N. Y. 438. In an action upon a covenant against incumbrances, the plaintiff showed that there was an outstanding mortgage upon the premises; the defendant was permitted to show that the plaintiff agreed, as part of the purchase-money, to satisfy or discharge the mortgage. Reid *v.* Sycks, 27 Ohio St. 285.

[3] Smith *v.* Read, 51 Conn. 10.

mated" quantity, or coupled with the clause of "more or less," or is clearly a matter of description, it is not a covenant.[1] So, where the quantity is mentioned in addition to the boundaries in the description of the estate, the quantity yields to the boundaries if they do not coincide.[2] If, on the other hand, the quantity be "of the essence of the contract between the parties, the covenant is construed relatively to the quantity of land conveyed, and is to be deemed an assurance to the purchaser of the existence of that quantity."[3] The rule as stated by Gray, J., in its application to executed as well as executory contracts to convey land, is this: "In the agreement for the sale and purchase of lands for an entire sum, either a description of the land by its boundaries, or the insertion of the words 'more or less,' or equivalent words, will control a statement of the quantity of land, or of the length of one of the boundary-lines; so that neither party will be entitled to relief on account of a deficiency or surplus, unless, in case of so great difference as will naturally raise the presumption of fraud or gross mistake in the very essence of the contract.[4] And a vendor would be liable for false representations as to the quantity or extent of the premises granted, if accompanied with damage, whether his deed contains covenants or not;[5] and this would be so for one reason, that a covenant of warranty as to the quantity of land conveyed by deed cannot be raised by parol proof of representations made at the time of executing the deed.[6]

§ 2410. **Damages — Covenant of Seisin.** — Where the covenant of seisin is broken, the measure of damages, with few

[1] Hall *v.* Mayhew, 15 Md. 551; Wright *v.* Wright, 34 Ala. 194; Beall *v.* Berkhalter, 26 Ga. 564, 567; Powell *v.* Clark, 5 Mass. 355, are descriptive merely, unless there be an express covenant. See Mann *v.* Pearson, 2 Johns. 37; Perkins *v.* Webster, 2 N. H. 287; McArthur *v.* Morris, 84 N. C. 405.

[2] Jackson d. Erwin *v.* Moore, 6 Cow. 717; Rogers *v.* Peebles, 72 Ala. 529.

[3] Beall *v.* Berkhalter, *supra*. Where a tract of land is sold, as a whole, for a lump sum, upon representation that it contains a certain number of acres, quantity becomes of the essence of the contract; and the grantee, after taking possession under his deed, may recover for the deficiency. Mendenhall *v.* Steckel *et al.*, 47 Md. 453.

[4] Noble *v.* Googins, 99 Mass. 231. See also Tarbell *v.* Bowman, 103 Mass. 343; Pickman *v.* Trinity Church, 123 Mass. 1.

[5] Whitney *v.* Allaire, 1 N. Y. 308. See Dobell *v.* Stevens, 3 Barn. & C. 623.

[6] Cabot *v.* Christie, 42 Vt. 121.

exceptions, is the purchase-money and interest. The consideration for which the purchase-money was paid having failed, the damages never exceed this.[1] The sum stated as the consideration in the deed may be controlled by evidence, and shown to be more or less than the sum mentioned.[2] So the value of what was given as the consideration, if it be land or chattels, may be shown as the ground of damages.[3] And where the consideration cannot be ascertained or its value shown, the rule of damages will be the value of the estate at the date of the conveyance.[4] Damages are allowed *pro rata*, if the seisin fail as to a part of the granted premises.[5] An exception to this rule prevailed where one not seised conveyed with covenants of seisin and warranty, and then acquired a title to the estate; for then, as this enured by force of the covenant of warranty to the benefit of the grantee, it was held that he could no longer maintain an action to recover back the purchase-money.[6] But if he had been evicted by the rightful owner, he could not have been compelled to accept the newly-acquired title of his grantor, but might have sued for the purchase-money if he chose so to do.[7] So where the grantee, under a deed with a covenant of seisin, enters and enjoys the estate, and from lapse of time has ceased to be liable for the profits at the suit of the real owner, it would seem that, in an action to recover back the purchase-money

[1] Rawle, Cov. (4th ed.) 235, and note for American cases; 4 Kent, Com. 475; Staats *v.* Ten Eyck, 3 Caines, 111; Marston *v.* Hobbs, 2 Mass. 433; Sedgw. Dam. 183; Nutting *v.* Herbert, 37 N. H. 346; Wilson *v.* Forbes, 2 Dev. 39; Brandt *v.* Foster, 5 Iowa, 295; Burton *v.* Reeds, 20 Ind. 93. It is the sum actually paid, and not the sum mentioned in the deed. Bingham *v.* Weiderwax, 1 N. Y. 513; Dayton *v.* Warren, 10 Minn. 237; Tucker *v.* Clarke, 2 Sandf. Ch. 96; Staples *v.* Dean, 114 Mass. 126.

[2] Belden *v.* Seymour, 8 Conn. 311, 312; Lawton *v.* Buckingham, 15 Iowa, 22; Bingham *v.* Weiderwax, 1 N. Y. 514.

[3] Hodges *v.* Thayer, 110 Mass. 286; Price *v.* Deal, 90 N. C. 290. See Hutchins *v.* Roundtree, 77 Mo. 500.

[4] Smith *v.* Strong, 14 Pick. 128. In this and the preceding case, the action was upon covenants in respect to lands situate in other States than where the actions were brought. Staples *v.* Dean, 114 Mass. 125.

[5] Morris *v.* Phelps, 5 Johns. 49, 55; Beaupland *v.* McKeen, 28 Penn. St. 124, 134; Lee *v.* Dean, 3 Whart. 331; Rawle, Cov. (3d ed.) 89; Cornell *v.* Jackson, 3 Cush. 510; Partridge *v.* Hatch, 18 N. H. 498.

[6] Baxter *v.* Bradbury, 20 Me. 260; King *v.* Gilson, 32 Ill. 356.

[7] Blanchard *v.* Ellis, 1 Gray, 195, 200; *ante*, § 1929.

and interest, he must allow for the profits so received by him.[1] So where the covenant was that the grantor was seised of an indefeasible estate in fee, and, there being an outstanding title, the covenantee sues for a breach before he is interfered with by the true owner, on the ground of a breach because the character of the grantor's seisin was not such as answered the terms of the covenant, he will be entitled to recover only his actual damages. So in another case, for a similar breach, nominal damages alone were recovered, because he had been permitted to occupy under his grant until his title had become complete by adverse enjoyment.[2]

§ 2411. **Damages — Covenant against Incumbrances.** — As the covenant against incumbrances is one of indemnity, the covenantee can recover only nominal damages for a breach thereof, unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the incumbrance.[3] Thus, if the incumbrance be of a permanent character, such as a right of way or other easement which impairs the value of the premises and cannot be removed by the purchaser, as a matter of right the damages will be measured by the diminished value of the premises thereby occasioned, to be determined by a jury.[4] So, if it consist of an outstanding mortgage which the covenantee has paid and discharged, he will be entitled to recover the amount so paid, and interest, provided it is less than the value of the land.[5] But until he shall have removed such incumbrance, the grantee can recover only nominal damages for the obvious reason that, if another person is

[1] Whiting *v.* Dewey, 15 Pick. 428, 435; Catlin *v.* Hurlburt, 3 Vt. 403, 409.

[2] Garfield *v.* Williams, 2 Vt. 327; Wilson *v.* Forbes, 2 Dev. 30, 35.

[3] Rawle, Cov. (4th ed.) 288, 293; Morrison *v.* Underwood, 20 N. H. 369; Funk *v.* Creswell, 5 Iowa, 62.

[4] Harlow *v.* Thomas, 15 Pick. 66; Batchelder *v.* Sturgis, 3 Cush. 201, 206; Lamb *v.* Danforth, 59 Me. 322; Haynes *v.* Young, 36 Me. 557; cases of existing highways, *ante*, § 2385; Fritz *v.* Pusey, 31 Minn. 368 (unexpired term of lease).

[5] Prescott *v.* Trueman, 4 Mass. 627; Norton *v.* Babcock, 2 Met. 510, 516; Estabrook *v.* Smith, 6 Gray, 572; Harrington *v.* Murphy, 109 Mass. 219; Johnson *v.* Collins, 116 Mass. 392. Where a grantee had a covenant against incumbrances as to undivided one-fourth and none as to remaining three-fourths of his estate, and was obliged to pay off a betterment assessment laid upon the whole estate before the conveyances to him, it was held, that he could recover only one-fourth of the sum paid. Smith *v.* Carney, 127 Mass. 179. And see Coburn *v.* Litchfield, 132 Mass. 449; Wright *v.* Nipple, 92 Ind. 310.

liable for the mortgage-debt, the holder of the mortgage may never avail himself of his mortgage lien upon the land, or disturb the purchaser in the enjoyment of the premises.[1] If the incumbrance be an attachment upon the land, which is afterwards enforced by levy upon it, the measure of damages will be the amount for which the same was so levied upon, and by which the judgment was satisfied; for the purchaser in such a case has actually been dispossessed, and must pay that sum to regain his possession and estate.[2] If the incumbrance is of a kind which admits of being removed, and the purchaser shall have extinguished it, he may recover upon his covenant what he may have fairly and reasonably paid for such extinguishment,[3] though he pays off the incumbrance after the action is commenced.[4] So he may recover whatever actual damage he may have sustained by the incumbrance, although the covenantor may have removed it before action brought.[5] But it seems that the purchaser is not bound to redeem; and if the incumbrance, by a failure to redeem, grows into an absolute estate, and the purchaser thereby loses his title altogether, he may recover in damages the purchase-money and interest.[6]

§ 2412. **Effect of Full Satisfaction for Breach.**— The following principle, applicable as well to an action upon a covenant of seisin as to that against incumbrances and of warranty, seems now to be settled: If such covenantee recover and receive of the covenantor full satisfaction in damages for the value of the premises, equal to the purchase-money and interest, his covenantor and grantor is thereby remitted to his right and title

[1] Wyman *v.* Ballard, 12 Mass. 304; Tufts *v.* Adams, 8 Pick. 547; Funk *v.* Voneida, 11 Serg. & R. 112. See *ante*, § 2384.

[2] Barrett *v.* Porter, 14 Mass. 143; Wyman *v.* Brigden, 4 Mass. 150.

[3] Rawle, Cov. (4th ed.) 293 *et seq.*, and note of American cases; 4 Kent, Com. 475; Morrison *v.* Underwood, 20 N. H. 369; Funk *v.* Creswell, 5 Iowa, 62, 64; Funk *v.* Voneida, 11 Serg. & R. 113, 114, 117; Smith *v.* Carney, 127 Mass. 179.

[4] Johnson *v.* Collins, 116 Mass. 394, and cases there cited; Morehouse *v.* Heath, 99 Ind. 509. Where, to save eviction, one buys a paramount title, he can recover the price paid, if the amount is not unreasonable. Snell *v.* Iowa Homestead Co., 59 Iowa, 703. And it must not exceed the sum originally paid the defendant. Price *v.* Deal, 90 N. C. 290. That the covenantee may recover the cost of extinguishing the incumbrance without regard to the purchase price. See Walker *v.* Deaver, 79 Mo. 679. See Rawle, Cov. (4th ed.) 295, 297.

[5] Wetherbee *v.* Bennett, 2 Allen, 429.

[6] Blanchard *v.* Ellis, 1 Gray, 195, 203; Chapel *v.* Bull, 17 Mass. 213.

to the granted promises as he held them before he had granted them away, and the covenantee would be estopped, by such a judgment, to set up his title-deed against his grantor.[1]

§ 2413. **Damages — Covenant of Warranty.**— In the matter of the rule of damages for the breach of the two covenants thus far considered, there does not appear to be substantially any difference between the several American courts. But in respect to the covenant of warranty, or for quiet enjoyment, there would be found differences of a most decided character. This depends upon the theory which they adopt in applying the law. In some of the States, the covenant of warranty is assumed to take the place of the ancient warranty of the feudal law; and by that, if the vassal was evicted of his lands by a better paramount title, he received from his lord other lands as a substitute, of the *same value as those he had lost, computed as at the time of the warranty.* As the thing recovered now is money instead of land, the same idea is carried out by giving the party who has lost his land the money he paid for it, and interest, so as to restore him to his original condition in that respect.[2] And if the conveyance and covenant be made to two persons as tenants in common, they may sue separate actions for the breach thereof in respect to their several interests.[3] Where one purchased land with covenant of warranty, which was under mortgage, and he yielded to a foreclosure thereof by sale of the premises, wherein he became purchaser, he recovered as damages, in his action upon the covenant, what he had to pay to satisfy the mortgagee's claim.[4] In other States the covenant is regarded as one of indemnity, and the rule of damages is to restore to the covenantee what he shall have lost by the failure of the other party to keep his covenants; and therefore the measure of damages is the value of the

[1] Porter *v.* Hill, 9 Mass. 34, 36; Stinson *v.* Sumner, id. 147, 150; Blanchard *v.* Ellis, 1 Gray, 195, 203; Parker *v.* Brown, 15 N. H. 176, 188; Kincaid *v.* Brittain, 5 Sneed, 124. Where a covenantee proves claim for dispossession against his covenantor's estate in bankruptcy, the covenant is extinguished. Bradford *v.* Russell, 79 Ind. 64.

[2] Rawle, Cov. (4th ed.) 300; Brandt *v.* Foster, 5 Iowa, .298; Guthrie *v.* Russell, 46 Iowa, 269; Kingsbury *v.* Milner, 69 Ala. 502; Stebbins *v.* Wolf, 33 Kan. 765.

[3] Lamb *v.* Danforth, 59 Me. 324.

[4] Claycomb *v.* Munger, 51 Ill. 377.

premises at the time of the eviction. This, of course, covers improvements made by the occupant, and the increased value of the premises arising from the general rise of property, or any other circumstance.

§ 2414. **Same Subject—Rules of Different Courts.**—It is hardly necessary to say, that, in a country where the value of lands is changing rapidly from a great variety of causes, it is a question of great moment to the respective parties, whether the one or the other of these rules is to prevail. Mr. Rawle has collected the cases in the different States bearing upon this point;[1] from which it appears that the value of the land at the time of eviction is adopted as the measure of damages in Connecticut, Vermont, Maine, South Carolina,[2] and Massachusetts. The States which adopt the value of the lands at the time of conveyance, as the measure of damages, are New Jersey, Virginia, Tennessee, New Hampshire, New York, Pennsylvania, Ohio, North Carolina, Georgia, Kentucky, Indiana, Arkansas, Missouri, Iowa, Wisconsin, and the courts of the United States. By the value of the estate, at the one time or the other, as the measure of the damages, will be understood the limit to which the law allows the party to recover; while there are often circumstances, which it is not proposed here to stop to explain, which would reduce this amount, in certain cases, below that limit. For example, where the ouster is by a mortgagee, and the mortgage is less than the value of the land, the covenantee is allowed to recover only the amount of the mortgage and interest, for it clearly is for the interest of the holder of the equity of redemption to redeem the estate from the mortgage.[3] It may be added, that if a covenantee, against whom an action is brought by one claiming the land to recover the same, defend against the suit in good faith, and is evicted by a judgment, he will be entitled to recover of his covenantor the cost of such suit, and, as held by some courts, the fees he may have had to

[1] Rawle, Cov. (4th ed.) 300–312. See also Nunnally *v.* White, 3 Met. (Ky.) 592; Burton *v.* Reeds, 20 Ind. 93; Zent *v.* Picken, 54 Iowa, 535; Mooney *v.* Burchard, 84 Ind. 285; Gore *v.* Brazier, 3 Mass. 523.

[2] *Quære.* See 4 Kent, Com. 475, note (*c*).

[3] White *v.* Whitney, 3 Met. 81, 89; Furnas *v.* Durgin, 119 Mass. 500, 506; McMahan *v.* Rowe, 114 Mass. 148.

pay for counsel. But, in Massachusetts, this last item is not allowed.[1]

[1] Rowe *v.* Heath, 23 Tex. 614; Morris *v.* Rowan, 17 N. J. L. 306; Rawle, Cov. (4th ed.) 309–312; Leffingwell *v.* Elliott, 10 Pick. 204. See Williamson *v.* Williamson, 71 Me. 442; Williams *v.* Burg, 9 Lea (Tenn.), 455; Webb *v.* Holt, 113 Mich. 338; s. c. 71 N. W. Rep. 637; Walton *v.* Campbell, 51 Neb. 788; s. c. 71 N. W. Rep. 737; Cullity *v.* Dorffel, 18 Wash. 122; s. c. 50 Pac. Rep. 932.

CHAPTER CVI.

TITLE BY DEVISE — WILLS.

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§ 2415. **History of Devises in England.** — Wills of land were in use among the Saxons. But upon the introduction of the feudal system by William I., A. D. 1066, they were abrogated, for various reasons. In the first place, livery of seisin, the ordinary *indicium* of title and ownership, could not be adopted, since a will never took effect until the death of the testator. In the next place, a free disposition of a feud by the last will of the tenant thereof might bring in an enemy of the lord to fight his battles and do his services. This continued to be the law, except in particular localities, until the general statute of wills passed in 32 and 34 Henry VIII., A. D. 1541. The custom of disposing of lands by means of last wills and testaments had, however, become very general, not by law, but rather against it, by means of uses, whereby the principle of the feudal law was evaded. This, as has been before explained when treating of uses, was effected, among other ways, by conveying lands to such uses as the feoffor should declare by his last will, in which case the legal estate passed by the feoffment, while chancery enforced the use which the feoffor might declare, in the form pointed out by him when making the feoffment. When, by the statute of 27 Henry VIII., called the statute of uses, the seisin was at once united to the use

in the transfer of estates, its effect was to destroy the power of devising lands by the way of uses; and they accordingly became undevisable, and remained so until the statute of wills, above mentioned, of the 32 and 34 Henry VIII.[1]

§ 2416. **Statute of Wills.** — The act of 32 Henry VIII., c. 1, authorizes any person holding lands by socage tenure "to give, dispose, will, and devise, as well by his *last will and testament in writing*, or otherwise by any other act or acts lawfully executed in his life," all his lands at his free will and pleasure. The statute 34 and 35 Henry VIII., c. 5, is explanatory of the first, and, by the fourteenth section, expressly declares "women covert," persons within the age of twenty-one years, idiots, and persons *de non sane* memory, incompetent to make a will.

§ 2417. **Statute of Frauds.** — This, it will be perceived, was about two hundred and fifty years after lands had become freely alienable by deed by virtue of the statute of *quia emptores*, 18 Edward I. It will also be perceived that the statute requires the will to be in writing; but it does not say by whom it is to be written, nor does it require the writing to be signed by the testator, or attested by witnesses. This led to such loose and often corrupt practices in palming off wills written by other persons as those of the supposed testators, after their deaths, that the subject was provided for in the famous statute of frauds of 29 Charles II., c. 3. In one case, the will was written down from statements of witnesses, and before the writing was completed the testator had become insensible, and so remained till he died; and yet the will was sustained, though, in respect to some of its clauses, the witnesses did not agree as to what the testator did declare.[2]

§ 2418. **Requisites of a Will.** — By that statute, a will devis-

[1] Wright, Ten. 171–173; Wild's case, 6 Rep. 16 *b*; 4 Kent, Com. 504; 6 Cruise, Dig. 3–5.

[2] Lawrence *v.* Kete, Aleyn, 54. The case, which is said have been the cause of inserting the clause as to wills in the statute of frauds, was Stephens *v.* Gerrard, 2 Keble, 128, where the testator dictated a will, and caused it to be interlined, and it was prepared to be signed and sealed by him, and he said he intended to write it over again, but that in the mean time it should be his will, though he refused to sign it. The testator dying, it was established as a will. See Roberts, Frauds, 307.

ing lands was required to be in writing, signed by the party making the devise, or by some person in his presence and by his direction, and attested and subscribed in his presence by three or four credible witnesses. By a recent statute in England, a will devising lands there must be signed at the bottom of the will by the testator, or some one by his direction and in his presence, and be attested by at least two witnesses, who must subscribe it in the testator's presence.[1] No particular form is required to make a testamentary writing. If the instrument vest no present interest, but only appoint what is to be done after the death of the maker, it is a testament. Nor does it make any difference that the parties intended it to be a deed.[2] The requirement of *signing* by the testator is held to be complied with by the testator's *making his mark*, even in New York, where the statute uses the word *subscribed*.[3] The mark, as the court observe, is the important thing: the signing the name around it is not material; nor is it material when it is done, or whether done at all, if the mark be proved to be made by him.[4]

§ 2419. **Of Joint and Mutual Wills.** — Two cannot join in making a will of their separate property to a third person; and where a husband and wife joined in executing a will of their separate property, it was not admitted as the will either of each or of both.[5] But wills mutually made by two testators in favor of each other may be good so far, that, upon the death of one, his will will take effect, and the other be defeated. So two may join in making a will of the property of one of them; since, so far as one of the makers is concerned, it is without effect.[6] The question of mutual wills made by two persons, and how far they are valid or may be enforced, has come up in different courts in England and in this country; and the result seems to be this: From the very nature of a

[1] Wms. Real Prop. 168; Stat. 7 Wm. IV. and 1 Vict. c. 26.

[2] Turner *v.* Scott, 51 Penn. St. 126; Burlington University *v.* Barrett, 22 Iowa, 60; Wall *v.* Wall, 30 Miss. 91.

[3] Van Hanswyck *v.* Wiese, 44 Barb. 494.

[4] Jackson *v.* Jackson, 39 N. Y. 153.

[5] Walker *v.* Walker, 14 Ohio St. 157; La. Rev. Civ. Code, 1875, § 1572. But see Dufour *v.* Pereira, 1 Dick. 419.

[6] Ibid.; Lewis *v.* Scofield, 26 Conn. 452; Evans *v.* Smith, 28 Ga. 98; Roger's Appeal, 10 Me. 303.

will, and its being ambulatory during the life of the maker, such wills are revocable by either party during the life of the other; but if either dies without a revocation of his will, and thereby the will of the deceased takes effect, that of the other, if unrevoked till then, becomes a compact, which will, in equity, bind the assets covered and disposed of therein; and the same will be enforced as a trust in favor of whoever was intended to be benefited thereby. The same would be the effect of two persons executing a joint will, where one of them dies before either shall have revoked it;[1] but if the agreement as to making mutual wills be oral, and is intended to include real estate, it is within the statute of frauds, and either party may revoke a will made to carry out such agreement.[2]

§ 2420. **Will made on Sunday valid.** — It has been decided that the drafting and execution of a will are not within the terms of a statute prohibiting all secular work, business, or labor on Sunday; so that a will is not invalid because made on that day.[3]

§ 2421. **Contract to make a Will.** — A person competent to make a will may bind himself by contract, made for a valuable consideration, to make a will in favor of another, and the contract may be in some cases enforced by a court of equity, by a decree for specific performance, or it may furnish ground for an action at law in case of a breach. The contract, however, must be clearly proved.[4]

§ 2422. **Will ambulatory until Testator's Death.** — A will is always ambulatory, as it is called, always inchoate, and may, at any time, be altered or destroyed by the testator during his life. It is only operative and effectual at and after his death.[5]

§ 2423. **What the Witnesses may testify to.** — The witnesses to a will are, in the theory of the law, placed around the

[1] *Ex parte* Day, 1 Bradf. 478; Dufour *v.* Pereira, 1 Dick. 419, a case of a mutual will of husband and wife, which she proved after his death. Schumaker *v.* Schmidt, 44 Ala. 454, 467; 1 Redfield, Wills, 183, pl. 25; 4 Am. L. Rev. 658.

[2] Gould *v.* Mansfield, 103 Mass. 408.

[3] Bennett *v.* Brooks, 9 Allen, 118; George *v.* George, 47 N. H. 27.

[4] Burgess *v.* Burgess (Penn.), 2 Eastern Rep. 276.

[5] Vynior's case, 8 Rep. 82 *a*; 2 Bl. Com. 502; 4 Kent Com. 520.

testator when executing it, as judges of his capacity to make it; and when called upon to testify in respect to this capacity, they are, unlike all other witnesses who do not come within the class of "experts," at liberty to express an opinion upon the subject, which is to be taken as competent though not conclusive evidence by the court or jury.[1]

§ 2424. **How a Will should be Witnessed.** — It is not necessary for the witness to see the testator sign, if he requests the witness to attest it, and he does so in the testator's presence.[2] But it does not matter upon what part of the instrument the witnesses subscribe their names, nor need they sign in each other's presence: if done in that of the testator, it is sufficient. The attestation clause appended to a will is no part of the instrument; nor is it important that it should recite the details of its execution, though useful, if the witness is dead, to show why he subscribed it.[3] It may be by mark, instead of writing the name.[4] It will be sufficient if there are three genuine names attested to the will, although none of the witnesses recollects the act of signing his name.[5] But it is essential that the attestation should be made *after* the testator has signed the will. It will not be sufficient that the witness subscribes his name first, though the testator knows and intends to adopt his signature as an attestation.[6] But if the court are satisfied that the testator's signature was upon the paper when he asked the witnesses to attest it, though they did not see the signature, nor see him sign it, it will be sufficient.[7]

§ 2425. **Witnesses must subscribe in Testator's Presence.** — The witnesses must subscribe their names, attesting the will in the presence of the testator. What shall be a "presence" depends somewhat on circumstances. But it seems to be necessary, first, that the witnesses, when subscribing, should

[1] 1 Greenl. Ev. § 440.

[2] Tilden *v.* Tilden, 13 Gray, 110; Nickerson *v.* Buck, 12 Cush. 332, 341.

[3] Jackson *v.* Jackson, 39 N. Y. 159.

[4] Redfield, Wills, 229, 231, 233.

[5] Eliot *v.* Eliot, 10 Allen, 357.

[6] Chase *v.* Kittredge, 11 Allen, 49. But see Vaughan *v.* Vaughan, Redfield's note, 13 Am. L. Reg. 735, 741; Jackson *v.* Jackson, 39 N. Y. 153. It is not enough if the testator sign immediately after the witness's attestation.

[7] Beckett *v.* Howe, L. R. 2 Prob. & Div. 1; Roberts *v.* Welch, 46 Vt. 164.

be in such a situation that the testator could see the act done, and know whether the paper which they attested was his will; and, second, the attestation must be made while the testator is in a conscious state. If subscribed in his bodily presence, while he is insensible, it is a void attestation.[1] But a mark made by the testator in place of his name, if intended as a signature, will be a good execution of a will.[2]

§ 2426. **Witnesses must be Competent.** — In the next place, the witnesses must be competent to testify at the time of attestation. In some States they are required to be *credible;* in others, *competent.* But the meaning of the terms is the same.[3] One named as executor in a will is a competent witness;[4] and so is an heir-at-law who is disinherited by the will.[5] A wife may not be a witness to her husband's will;[6] nor is she a competent witness to a will containing a devise to her husband.[7]

§ 2427. **Execution of Will of Land governed by Lex Rei Sitæ.** — The law of the place where the land is situate governs in the matter of the forms and solemnities requisite to give effect to a will designed to operate upon the same; though in a majority of the States a will made according to the forms of the other State where the testator dwells may be admitted to probate in the State where the land is situate.[8]

§ 2428. **The Number of Attesting Witnesses Required** to give validity to a will of lands, is entirely dependent on the statute of the State in which the land lies. In some States at least three witnesses are required, in others two are sufficient. The reader is referred to the statutory compilation at the end of this chapter. It will be noted that certain States make an

[1] 2 Greenl. Ev. § 678.

[2] Nickerson *v.* Buck, 12 Cush. 332, 341.

[3] 2 Greenl. Ev. § 691; Hawes *v.* Humphrey, 9 Pick. 350; Haven *v.* Hilliard, 23 Pick. 10. See also the cases of Windham *v.* Chetwynd, 1 Burr. 414, and Hindson *v.* Kersey, 4 Burn. Eccl. Law, Phill. ed. 116, for the celebrated conflict of opinion between Lord Mansfield and Lord Camden upon the point of time in respect to which this competency relates, whether the making or the probate of the will. Warren *v.* Baxter, 48 Me. 193.

[4] Wyman *v.* Symmes, 10 Allen, 153.

[5] Sparhawk *v.* Sparhawk, 10 Allen, 155.

[6] Pease *v.* Allis, 110 Mass. 157.

[7] Sullivan *v.* Sullivan, 106 Mass. 474.

[8] Story, Confl. Laws; United States *v.* Crosby, 7 Cranch, 115.

exception in this regard in favor of holographic wills, which are wholly written and signed by the testator.

§ 2429. **Of Sealing a Will.** — In Vermont and New Hampshire, a seal is required to give validity to a will. But though very frequently adopted by testators in other States, it is not, it would seem, necessary in any other State to the validity of a will.

§ 2430. **Other Formal Requisites.** — In Pennsylvania, it seems, while it is necessary to prove a will by at least two witnesses, it is not requisite that they should have attested and subscribed the same in the testator's presence. Besides these general requirements, there are more or less stringent rules adopted in most of the States, in respect to the presence of the witnesses at the execution of the will, as to how far they must see the testator sign in order to attest its execution, and how far the testator, when executing it, must make an express declaration or publication that it is his will, etc., which it is not deemed important to detail in a work which does not profess to treat of the practical forms of conveyancing.

§ 2431. **Of Legatees and Devisees as Witnesses.** — To obviate the incompetency, by reason of interest, of a legatee or devisee to be a witness to a will, it is declared, in most of the States, that such legacy or devise shall be void.[1] And a general statute removing the incompetency of witnesses by reason of interest would not repeal a prior act of the character last stated.[2] Nor will such a general removal of incompetency by reason of interest permit an interested party to prove the execution of a will, although, on a contest, his testimony could be received to other points.[3] By the English law, a legacy or devise to a subscribing witness is void; but if, after the making of such a will, the testator make a codicil to it, which is attested by the proper number of disinterested witnesses confirming his former will, it will give validity to the legacy to the attesting witness.[4] In New York, a devise to a subscribing witness is void if the will cannot be proved without his testi-

[1] 4 Kent, Com. 508.

[2] Elliot *v.* Brent, 6 Mackey (D. C.), 98.

[3] Miltenberger *v.* Miltenberger, 78 Mo. 27; Nixon *v.* Armstrong, 38 Tex. 296. But see Hays *v.* Ernest, 32 Fla. 18; s. c. 13 So. Rep. 451.

[4] Anderson *v.* Anderson, L. R. 13 Eq. 381.

mony; but if there are a sufficient number of other witnesses to establish the will without the testimony of this legatee, his legacy will be valid.[1] If one make a testamentary paper which is ineffectual as a will for the want of a second witness, and then make a new paper, properly attested, in which he declares it to be a codicil to his last will, it will have the effect to republish and give effect to the first paper as a will; and it may be shown by parol that it was the paper intended and referred to in the codicil.[2] If one named as a legatee in a will attest a codicil to this will in which he is not named as a legatee, it does not affect his right as a legatee under the will. So if there be a residuary devise to one in a will which he did not attest, and he did attest a codicil which revoked a legacy given in the will, whereby the residuary portion given therein is enlarged, the fact that the legatee attested the codicil will not invalidate the devise given him by the will.[3] The English law, unlike that of New York, holds that a legacy given to a subscribing witness to a will, although his testimony is not necessary to establish the will by reason of there being the requisite number of subscribing witnesses besides him, would be void.[4]

§ 2432. **Effect of Probate.** — In respect to the effect of admitting a will to proof, a different rule prevails in most if not in all the States from that in England. In the latter, wills of the personalty are filed and admitted to proof in the proper probate court, and when so proved become valid to all intents, and are received as such in the trial of all collateral questions depending upon their validity. But, there being no provision for the probate of wills of real estate, it is necessary to establish their execution by proof whenever any question arises in courts involving the inquiry; whereas, in this country, provision is made in the several States for establishing a will by a general probate thereof, when it becomes, like a judgment of court, conclusive evidence of its own due execution in the

[1] Cornwell *v.* Wooley, 1 Abb. Dec. 442.

[2] Allen *v.* Maddock, 11 Moore, P. C. 427–461.

[3] Gurney *v.* Gurney, 3 Drew. 208.

[4] Cozens *v.* Crout, 21 Week. Rep. 781; 42 L. J. Ch. 840; Gaskin *v.* Rogers, L. R. 2 Eq. 295.

trial of any matter involving such an inquiry in any other court.[1]

§ 2433. **At what Time a Will Speaks.** — Though wills speak, as it is called, at the death of the testator, and have no operation until then, it often becomes necessary to inquire when they were made, in order to determine questions involving their validity and effect; as, for instance, whether at that time the testator was of competent age, of sane mind, and the like, and also whether the will operated upon property of which the testator may be in possession at his death. Thus, while at common law a will operated upon whatever personal property the testator might have at the time of his death, such was not the case with his real property, of which only so much passed by the will as the testator was seised of at the time of making his will, and continued to be seised of at the time of his death. After-acquired real property did not pass by such will, even if acquired by an exchange for what he did then own. And if the testator should have sold a parcel of the land which he held at the time of making his will, and afterwards repurchased the same, it would come within his after-acquired property.[2] So if he had changed his interest as mortgagee into an absolute ownership by foreclosure.[3]

§ 2434. **At what Time a Will Speaks — Present Statutory Changes.** — But now, by the present English law upon the subject, a will speaks as if made at the testator's death;[4] and whatever he may then have which is within the terms of the will, and is intended to be devised, passes thereby. And such is substantially the law in nearly all of the United States, by statute; although in some States such real estate passes if no contrary intention appear in the will, while in the other States an intention to devise such property must appear in the will. So if particular land is described in a will, and there are no general words covering other land, only the land described passes.[5]

[1] 1 Greenl. Ev. § 518.

[2] Wms. Real Prop. 172; 1 Jarm. Wills, 1st Am. ed. 43; 4 Kent, Com. 510.

[3] Brigham *v.* Winchester, 1 Met. 390; Ballard *v.* Carter, 5 Pick. 112; Frazier *v.* Boggs, 37 Fla. 307; s. c. 20 So. Rep. 245.

[4] Wms. Real Prop. 173.

[5] Blaisdell *v.* Hight, 69 Me. 306.

§ 2435. **Apparent Exception — Effect of Devise Postponed.** — There is a class of cases, where, though the devise takes effect at the death of the testator, it may be partially postponed as to its complete effect, as where it is to a class of individuals, such as the children of A. If there be no particular or intermediate estate interposed between the death of the testator and the coming into possession by the devisees, only such of A's children as shall have been born at the testator's death can take, excluding after-born children. But if there be a particular estate interposed, as to A for life, and then to the children of A, it will include all who shall have been born during the life of A, vesting in such as were born before the testator's death, and opening to let in such as are born afterwards; or, if all are dead except one, without leaving issue, the survivor takes the whole. So if, for any cause, one only can take, such would be the law as to time.[1]

§ 2436. **Who may make a Will.** — The general qualifications of a testator or testatrix for making a good will are age, mental capacity, and freedom from legal disability. Persons of unsound mind are always excluded. The age of capacity varies from fourteen years (Georgia) to twenty-one.[2] The capacity of females is derived entirely from statutes, to which the reader is referred. The result of these statutes is, that in nearly all of the United States a married woman may make a will as if she were single. In many States, however, she cannot deprive her husband, without his consent, of certain specific portions of her property, which are given him by the law; e. g., curtesy, or his distributive share of her estate, or the use of one-half her real estate, for life, if they have had no children born alive, unless she is living apart from him for justifiable cause.[3]

§ 2437. **What Constitutes "Sound and Disposing Mind."** — In respect to what is called a "sound and disposing mind and memory," — it is impossible to draw a precise line between such as are and such as are not thus qualified. The difficulty

1 Jarm. Perk. ed. 296, 297; 2 id. 55, 56; Redfield, Wills, 386; Handberry *v.* Doolittle, 38 Ill. 202; Campbell *v.* Rawdon, 18 N. Y. 415; Downing *v.* Marshall, 23 N. Y. 374, 375.

2 See statutes at the end of this chapter.

3 See statutes *ante*, § 539, note; *post*, at the end of this chapter.

is in fixing and applying anything like a uniform test or standard. In a case in Vermont, the court, Redfield, J., uses this language: "He must undoubtedly retain sufficient *active* memory to collect in his mind, without prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their more obvious relations to each other, and to be able to form some rational judgment in relation to these." Among these *elements* he mentions the number of the testator's children, their deserts with reference to conduct and capacity, what he had done for them relatively to each other, and the amount and condition of his property, etc.[1] In another case, in Connecticut, the court held that it was not essential to the legal capacity of a testator to make a will that he should be capable of managing business generally. It is sufficient, if, in making his will, he understands what he is doing.[2] The question of the mental capacity of a testator to make a will has reference to the point of time when it is made. If sane then, it makes no difference that he was, at the time, under guardianship as an insane person;[3] nor that he committed suicide shortly after, since that act is only in the nature of evidence bearing upon the point.[4] Among the most remarkable cases where a will made by a lunatic was held to be made in a lucid interval is that of Cartwright *v.* Cartwright,[5] where the testatrix's hands were untied by the person who had charge of her as a furious lunatic, and she sat down and wrote her own will, which was so proper and consistent in all its parts, that the court sustained it. On the other hand, though, as to most subjects, the testator may be sane, yet if, in respect to one or more subjects, he is under an habitual insane delusion, and makes his will under the influence of such delusion, and its terms are modified or controlled thereby, such will would be invalid. An instance illustrative of this partial insanity or monomania in the testator, which avoids a will, was the case of Mr. Greenwood, a lawyer, whose will was made while he was in full practice at the bar, and was

[1] Converse *v.* Converse, 21 Vt. 170.

[2] Kinne *v.* Kinne, 9 Conn. 102. See Stewart *v.* Lispenard, 26 Wend. 255.

[3] Breed *v.* Pratt, 18 Pick. 115.

[4] Brooks *v.* Barrett, 7 Pick. 94.

[5] 1 Phillim. 90. See 1 Jarm. Wills, 1st Am. ed. 29, notes of American cases.

set aside on account of an insane delusion in respect to a brother, under the influence of which he disinherited him.[1] The question is one of fact, to be decided on the evidence; and for further consideration of the subject, reference is made to Greenleaf on Evidence.[2]

§ 2438. **Who may be Devisees.** — In respect to the question, who may be devisees, there is scarcely any limit except such as is created by statute, as in England, by those against mortmain. In some of the United States, as, for instance, in New York, corporations may be devisees only to a limited extent prescribed by statute.[3] So, in Delaware, a church may not be a devisee; but *femes covert*, infants, aliens, and persons of non-sane memory, may be devisees, and take accordingly.[4] The United States may be devisee;[5] but not in New York.[6]

§ 2439. **Of Devises to Charitable Uses — Cy pres.** — There is one class of devises authorized by statute, where the ordinary requirement that there should be some distinct person or class of persons named as the devisees, who are capable of taking, in order to have the devise effective, is dispensed with. These are devises "to charitable uses," which are the subjects of the statute of 43 Eliz. c. 4, which has been substantially, though not by re-enactment, adopted as the law of many of the United States. The preamble to that statute recites the nature and classes of these devises, such as those for the maintenance of the sick, of schools of learning, of education, and for the preferment of orphans, and a great variety of other public or benevolent objects, in which no persons or corporations are named, or trustees created, to hold and manage the property; or, if named, the beneficiaries are not designated. In cases like these, devises would, at law, be utterly void for want of a person of sufficient capacity to take as devisee.[7] And, as the law

[1] See 1 Wms. Exrs. 27, and 3 Add. 96, 97, and Erskine's speech in Hadfield's case.

[2] Vol. 2, §§ 689 *et seq.*

[3] United States *v.* Fox, 94 U. S. 315.

[4] 4 Kent, Com. 506, 507; 1 Jarm. Wills, 1st Am. ed. 57, and notes; Willard, Real Est. 475; 1 Jarm. Wills, 59, and Perkins' note; Ferguson *v.* Hedges, 1 Harring. 524. No general statute of mortmain exists in the United States, except in Pennsylvania. 6 Cruise, Dig. 128, note.

[5] Dickson *v.* United States, 125 Mass. 311.

[6] United States *v.* Fox, 94 U. S. 315.

[7] Story, Eq. Jur. §§ 1146, 1160, as to how far devisees must be designated to

still is, a bequest for such "benevolent" purposes as trustees may agree upon does not come within the rule of "charitable devises." [1] But where the word "benevolence" was coupled with "charity," or used in connection with it, it was held to limit and define the nature of the charity, but not to impair the effect of the devise.[2] Under this statute, courts of chancery are empowered to appoint commissioners to superintend the application and enforcement of such charities, so that the devises are made to take effect; and if, from any cause, the charity cannot be applied precisely as the testator has declared, such courts exercise the power in some cases of appropriating it, according to the principles indicated in the devise, as near as they can, to the purpose expressed. And this is called an application *cy pres*.[3] But still, if the charity be of a general, indefinite, and mere private nature, or not within the scope of the statute of Elizabeth, it will be treated as utterly void.[4]

§ 2440. **Illustrations.** — A testator gave estate, real and personal, "to the cause of Christ, for the benefit and promotion of true evangelical piety and religion." He directed his executors to collect his property, etc., and pay it over to A, B, and C (naming them), "to be distributed in such divisions, and to such societies and religious charitable purposes, as they may think proper." One of the heirs brought a real action to recover a share of the testator's real estate, on the ground that a sale by the executor, for the purpose of paying over the proceeds to A, B, and C, was void. It was held, that the statute 43 Eliz. c. 4, was in force in Massachusetts; and, after referring to several cases of analogous devises which had been sustained, the court held that this case came within the principle of the statute, and sustained it as a good devise; the sale by the executor, for the purpose of executing it, was also held good. In another case, the devise was to A and B, to manage, invest,

have devise take effect. See 6 Cruise, Dig. 133, note; Vidal *v.* Girard, 2 How. 127, 193; Baptist Assoc. *v.* Hart, 4 Wheat. 33–49; Levy *v.* Levy, 33 N. Y. 102; Loring *v.* Marsh, 6 Wall. 337.

[1] James *v.* Allen, 3 Meriv. 17; Chamberlain *v.* Stearns, 111 Mass. 267.

[2] Saltonstall *v.* Sanders, 11 Allen, 470.

[3] Atty.-Gen. *v.* Bowyer, 3 Ves. 714; Story, Eq. Jur. §§ 1169, 1176. See Bliss *v.* Am. Bible Society, 2 Allen, 334.

[4] Story, Eq. Jur. § 1183.

and reinvest the property according to their best discretion; and that they or their successors should select three persons, who should determine how, by payments to incorporated charitable institutions, the testator's wish to benefit the poor might be best carried into effect. One of the two persons named died in the life of the testatrix; and the survivor, after her death, appointed the three who were to designate the charitable institutions as mentioned in the will. It was held that this power of selection survived as a part of the trust; and that, as a charitable trust, the devise took effect in favor of the institutions selected.[1]

§ 2441. **Devises to Charitable Uses in Pennsylvania.** — It is stated, that though the statute was never in force in Pennsylvania, as that State had no court of chancery, a principle like it was incorporated into the common law.[2] In Pennsylvania it has been held that property *vested* in a religious society, whether incorporated or not, is a charitable use, whether the donors be one or many; and, if the corporation or society should undertake to divert the funds, equity would raise some other trustee to administer them and apply them according to the intention of the original donors or subscribers.[3]

§ 2442. **Jurisdiction of Equity over Charitable Uses.** — There were two statutes of Elizabeth relating to charitable uses, — one 39 and 40 of that reign, c. 5 and 6; the other 43 and 44, c. 4. But it is chiefly in relation to the last that reference is herein made. The subjects embraced in this statute will be found recited in the note below.* But, being of a highly reme-

* Note. — "Relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; relief stock or maintenance for houses of correction; marriage of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; and for aid or easement of any poor inhabitants concerning

[1] Loring *v.* Marsh, 6 Wall. 337.

[2] Going *v.* Emery, 16 Pick. 107, 119; 1 Jarm. Wills, 197, 1st Am. ed. notes; 4 Kent, Com. 508, and American cases cited in note Vidal *v.* Girard, 2 How. 127, 192; Zimmerman *v.* Anders, 6 Watts & S. 218; Witman *v.* Lex, 17 Serg. & R. 88; Baptist Assoc. *v.* Hart, 4 Wheat. 1. See Greene *v.* Dennis, 6 Conn. 292, 299; Dexter *v.* Gardner, 7 Allen, 246; Earle *v.* Wood, 8 Cush. 430.

[3] Schnorr's Appeal, 67 Penn. St. 146; Roshi's Appeal, 69 Penn. St. 467.

dial nature, the courts have been very liberal in extending it to various related matters not enumerated in the act itself;[1] and not only so, but, by adopting the doctrine of *cy pres*, a devise for one object has been applied to another whose relation was exceedingly remote from, if not altogether foreign to, that named in the devise. In respect to the extent to which the statute of the 43 Elizabeth has been incorporated into the jurisprudence of this country by re-enactment or otherwise, it is stated by Mr. Perkins, in his note to Jarman on Wills,[2] that it is in force in North Carolina and Kentucky; that the principle and substance of it are a part of the law of Massachusetts, and a part of the common law of Pennsylvania, where it is practically acted upon, though not technically in force;[3] that it has been repealed in Virginia, and is not in force in Maryland; while it is doubtful how far it is in force in Mississippi. In Virginia, New York, Tennessee, and Wisconsin, charitable devises and bequests stand upon the same footing as other trusts.[4] In Massachusetts, the statute of 43 Elizabeth is in force.[5] A corporation, having accepted a donation as a charity, cannot renounce it, but may be compelled to hold and apply it. If a trustee declines to accept such a donation, other persons will be appointed for that purpose, and the legacy will not revert to the heirs of the donor.[6] Where there is a trust which cannot be strictly and literally observed, the court may cause it to be fulfilled as nearly in conformity with the intent of the donor as practicable; and upon this the court are to exercise their discretion. Thus the trustees of Count Rumford's fund were authorized to appropriate a part of the

payment of fifteens, setting out soldiers and others." See Jackson *v.* Phillips, 14 Allen, 551, 552, enumerating what are embraced under charitable trusts, that these were borrowed from the Civil Law, 554; and defining what a charity is in a legal sense, 556.

[1] See Tappan *v.* Deblois, 45 Me. 128; Jackson *v.* Phillips, 14 Allen, 539.

[2] 1 Jarm. 197, n.; 4 Kent, 8th ed. 567, note.

[3] Fontain *v.* Ravenel, 17 How. 386.

[4] Gallego *v.* Atty.-Gen., 3 Leigh, 450; Levy *v.* Levy, 33 N. Y. 137; Holmes *v.* Mead, 52 N. Y. 332, 339; Tilden *v.* Green, 130 N. Y. 29; s. c. 28 N. E. Rep. 880; Johnson *v.* Johnson, 92 Tenn. 559; s. c. 23 S. W. Rep. 114; McHugh *v.* McCole, 97 Wis. 166; s. c. 72 N. W. Rep. 631.

[5] Sanderson *v.* White, 18 Pick. 333.

[6] Wilkinson *v.* Lindgren, L. R. 5 Ch. Ap. 570.

income, not needed for the purposes expressed in the donation, to the purchase of books, philosophical apparatus, and to procuring lectures, although the objects proposed were the promotion of discovery and improvement in light and heat.[1] * The

* Note. Chancellor Kent says, "The weight of English opinion and argument would seem to be in favor of an original and necessary jurisdiction in chancery, in respect to bequests and devises in trusts, to persons competent to take for charitable purposes, when the general object of the charity was specific and certain, and not contrary to any positive rule of law;" and he adds, "It would appear from the preamble to the statute of Elizabeth that it did not intend to give any new validity to charitable donations, but rather to provide a new and more effectual remedy for the breaches of these trusts" (2 Com. 287–289; 4 Com. 508). See also Shotwell *v.* Mott, 2 Sandf. Ch. 46. Mr. Perkins, in his note to Jarman on Wills (197), has collected a large number of cases in which the question was raised, and reaches a conclusion in favor of an original jurisdiction in the court of chancery, independent of the statute of Elizabeth; and the same doctrine is sustained by Judge Story, in his last edition of Equity Jurisprudence (§§ 1154 c and 1154 d), in which he states that, in the case of Mr. Girard's will, the Supreme Court of the United States held "that there was a jurisdiction in chancery over charitable trusts antecedent to the statute of Elizabeth." See Beall *v.* Fox, 4 Ga. 404; Moore *v.* Moore, 4 Dana, 357. And the question of the existence of such a jurisdiction anterior to and independent of the statute is now regarded as settled. Jackson *v.* Phillips, 14 Allen, 577. In Potter *v.* Thornton, 7 R. I. 263, the court say, "It is conceded that chancery jurisdiction over charities is not conferred, either here or in England, by statute, but existed prior to any statute on the subject." And the court of Texas say, that opinions similar to those above expressed by Ch. Kent appear to have been held in Massachusetts, New York, Pennsylvania, Kentucky, Tennessee, and Mississippi; but they do not decide whether equity there will enforce a donation to charitable uses, where the donees are uncertain, or where the beneficiaries and objects of the trust are uncertain and indefinite. But there would be no doubt where there is an ascertained trustee competent to take, though the beneficiaries themselves are not known. Bell County *v.* Alexander, 22 Tex. 362, 364.

But the then fullest and most able discussion of the point had been in what is often spoken of in the courts as the "great argument" of Mr. Binney, in Vidal *v.* Girard (2 How. 146–164), in which he maintained that such uses as were declared in Mr. Girard's will were good at common law in England: that such trusts were entitled to protection in equity, upon the general principles of equity jurisdiction; that they enjoyed the protection, before the 43 Elizabeth, by the original jurisdiction of that court; and that the 43 Elizabeth was only an ancillary remedy. The importance of maintaining these consisted in the admitted fact, that, as a statute, the 43 Elizabeth had no validity or operation in Pennsylvania; and consequently, if the will was to be sustained, it must be by virtue of the common law, independent of that statute. As stated above by Judge Story, the Supreme Court sustained the will in a very learned and elaborate opinion. See also Inglis *v.* Trustees of Sailors' Snug Harbor, per Johnson, J., 3 Pet. 140.

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[1] Amer. Acad. of A. & S. *v.* Harvard College, 12 Gray, 582.

doctrine of charitable uses has been recognized in Maine, Vermont, New Jersey, Ohio, Iowa, South Carolina, Georgia, and Louisiana.[1] It is also in force in Maine.[2]

§ 2443. **Charitable Uses — New Jersey Doctrine.** — In New Jersey, the limitations in respect to charitable trusts are these: If no trustee is interposed, and no person in issue is capable of taking, or the charity is of an independent nature, or its execution, according to the original purpose, is or has become impracticable, the doctrine of charitable uses prevails so as to give effect to the devise; but if the charity is definite in its object, lawful in its creation, and capable of being executed under the direction of the donor, and is to be executed and regulated by trustees, whether private individuals or a corporation, it does not come under the statute of charitable uses. A charity, moreover, which is eleemosynary in its character, is always unsectarian, unless the terms of the devise are expressly otherwise.[3]

§ 2444. **Charitable Uses in New York.** — In New York the subject is now regarded as within the provisions of the revised statutes in respect to uses and trusts.[4] "It is very satisfactorily demonstrated that the system of charitable uses, as recognized in England, has no existence in this State; that the courts cannot sustain a trust or a use which is not within our statute of uses and trusts." "They do not include perpetual trusts for charity, or for the benefit of classes or of corporations." "A devise to a corporation is prohibited, except in cases where, by the law of its creation or some other law of the State, *the particular corporation* is authorized to take by devise." "A *cestui que trust* need not necessarily be

[1] McIntire Poor School *v.* Zanesville C. & M. Co., 9 Ohio, 203; Griffin *v.* Graham, 1 Hawks, 96; Gallego *v.* Atty.-Gen., 3 Leigh, 450; Gass *v.* Wilhite, 2 Dana, 170; Going *v.* Emery, 16 Pick. 107; Vidal *v.* Girard, 2 How. 146; Burr *v.* Smith, 7 Vt. 241; Dashiell *v.* Atty.-Gen., 5 Har. & J. 392; Tappan *v.* Deblois, 45 Me. 122, 128, 131; Miller *v.* Chittenden, 2 Iowa, 315; Beall *v.* Fox, 4 Ga. 404; American Bible Soc. *v.* Wetmore, 17 Conn. 181. See also Baptist Assoc. *v.* Hart, 4 Wheat. 1; Shotwell *v.* Mott, 2 Sandf. Ch. 46; Lalor, Real Est. 126–154.

[2] Howard *v.* Am. Peace Soc., 49 Me. 302; Drew *v.* Wakefield, 54 Me. 295.

[3] Atty.-Gen. *v.* Moore, 19 N. J. Eq. 503, 514.

[4] Bascom *v.* Albertson, 34 N. Y. 584, 590, 620; Levy *v.* Levy, 33 N. Y. 97, 122, 132, 133; Downing *v.* Marshall, 23 N. Y. 366.

described by name: any other designation or description by which he may be identified will do as well.[1]

§ 2445. **Cy pres Doctrine never fully received in this Country.** — The doctrine of *cy pres*, which has formed so important a part in the English courts in carrying out the law of charitable uses, does not necessarily enter into the administration of the doctrine of the law itself in this country; and the manner in which it has been exercised in England would be likely to render courts here slow in assuming such an authority. Not to multiply illustrations, one may serve as an example. Money had been bequeathed to found a Jews' synagogue; and, in executing the devise as a charity, the court transferred it to the benefit of a *foundling hospital!*[2] In some of the States, it is held to be a power not to be exercised by the courts;[3] in others, it is treated of as of doubtful validity,[4] while in others, the court exercise it, if at all, in strict conformity to the purposes expressed in the instrument creating the trust.[5] In Kentucky, it can only be applied to the mode of carrying into effect a charity; to an identified and ascertainable object, where the mode of exercising it is inadequate, illegal, or inappropriate.[6] It was held by Clifford, J., that the prerogative power of the English courts as to the doctrine of *cy pres*, is not within the jurisdiction of the United States court.[7] In Pennsylvania, this power of *cy pres* is one by which a well-defined charity, or one where the means of definition are given, may be enforced in favor of the general intent, even where the means or mode provided for by the donor fail by reason of their inadequacy or unlawfulness. It is the doctrine of approximation, and is not confined to the administration of charities.[8]

[1] Holmes *v.* Mead, 52 N. Y. 338, 339, 343; Tilden *v.* Green, 130 N. Y. 29; s. c. 28 N. E. Rep. 880.

[2] Story, Eq. § 1169.

[3] Beekman *v.* Bonsor, 23 N. Y. 308, 310; McAuley *v.* Wilson, 1 Dev. Ch. 276; Moore *v.* Moore, 4 Dana, 357; Holmes *v.* Mead, 52 N. Y. 344.

[4] Brown *v.* Concord, 33 N. H. 285.

[5] Harvard College *v.* Theol. Ed. Society, etc., 3 Gray, 283. See 7 Ves. Sumner's ed. 36, note; Jackson *v.* Phillips, 14 Allen, 592, 593; Sanderson *v.* White, 18 Pick. 333.

[6] Cromie *v.* Louisville Home Soc., 3 Bush, 375.

[7] Loring *v.* Marsh, 27 Law Rep. 390. See Fontain *v.* Ravenel, 17 How. 369.

[8] Philadelphia *v.* Girard, 45 Penn. St. 28; Pittsb. Meth. Ch. *v.* Remington, 1 Watts, 226; Fontain *v.* Ravenel, 17 How. 389.

§ 2246. **What may be Devised as Real Property.** — In respect to what real property may be devised, there seem to be few or no restrictions by law. Everything that would descend to the testator's heir upon his death, whether a legal or equitable interest, may be devised; and while this would exclude the interest of a joint-tenant which goes to a survivor, it includes executory interests in real estate, or possibilities coupled with an interest, but not mere possibilities.[1] Thus, where a devise was upon a condition subsequent, with a general devise by a residuary clause in the testator's will, and the first devisee forfeited his estate by failing to perform the condition, it was held that the right to enforce the condition, and to take the estate thereby forfeited, passed by such devise to the residuary devisee, and did not descend to the testator's heirs.[2] So, if one grant an estate-tail, he has still a reversion in him which may possibly take effect by failure of issue of his grantee, and is the subject of devise by the grantor.[3]

§ 2447. **Right to Enter for Condition Broken Devisable.** — So where one granted lands on condition subsequent, upon the breach of which the grantor or his heirs might enter and regain the estate, and the grantor then made his will containing a general residuary clause, it was held that the devisee therein named took thereby a right to enforce the condition as to said land, and recover the same for a breach thereof.[4] Any possibility coupled with an interest is the subject of devise.[5]

§ 2448. **To Whom lapsed Devises go.** — Cases like the above are to be distinguished from those of lapsed devises, which occur when the person to whom the testator gives the land dies before the testator. Such devise, at common law, would lapse; though in several, if not in all the States, if it is made

[1] Kean *v.* Roe d. Hoffecker, 2 Harring. 112.

[2] 1 Jarm. Wills, 2d Am. ed. 40–44; Hayden *v.* Stoughton, 5 Pick. 528; Brigham *v.* Shattuck, 10 Pick. 306. See 4 Kent, Com. 511, 513. The reader is referred to Mr. Hare's discussion of this subject, and his comments upon the cases above cited. 1 Smith, Lead. Cas. 114.

[3] Steel *v.* Cook, 1 Met. 281; 1 Jarm. Wills, 42, Perkins' note.

[4] Austin *v.* Cambridgeport Parish, 21 Pick. 215. *Contra*, Southard *v.* N. J. Central R. R. Co., 26 N. J. L. 13, 21. Such rights made devisable by stat. 1 Vict. 26; 1 Jarm. Perk. ed. 85. And are by statute devisable in North Carolina. Code, 1883, § 2140.

[5] Den d. Manners *v.* Manners, 20 N. J. L. 142.

to a son or grandson of the testator, it takes effect, by force of statute, in favor of the heirs of such son or grandson, if he die before the testator.[1] In Massachusetts, if a devise be made to a child or *other relative*, and the devisee die in the lifetime of the testator, it will go to the heirs of the devisee. But the wife is not a relative within the meaning of the statute.[2] In Pennsylvania, where a devise was to several, with a proviso that, if any of them died in the lifetime of the devisor, it should go to the heirs of such devisee, and he made his will and died in the lifetime of the original devisor, it was held that his heirs, and not his devisees, took the devise of the first devisor.[3] But a devise which fails by lapsing does not go to the residuary devisee, but to the heir-at-law of the testator, on the ground that the intent of the testator is to be taken as things stood when the will is made, and that he is not to be presumed to have intended to give to his residuary devisee what he had already given to one whom he expected to survive him, and what he would have taken if the will had taken effect at its date.[4] But if the devise is void *ab initio*, either because the devisee is dead before the will is made,[5] or is by law incapable of taking the devise, — as would be the case at common law where the devise is to a monk,[6] or, as in some cases, if made to corporations under the prohibitions of statutes,[7] — in such cases there seems to be a diversity in the law as to who shall take such void devise, whether the heir-at-law or the residuary devisee. The weight of American authority, however, is in favor of such devises going to the testator's heirs, on the ground that a residuary devisee of real estate takes only what was intended for him *at the time of*

[1] Greenl. Cruise, Dig. 128, note; 1 Jarm. Wills, Perk. ed. 301, note; Moore *v.* Dimond, 5 R. I. 121; Sheets *v.* Grubbs, 4 Met. (Ky.) 340.

[2] Pub. Stat. c. 127, § 23; Esty *v.* Clark, 101 Mass. 38; Cleaver *v.* Cleaver, 39 Wis. 96.

[3] Clark *v.* Scott, 67 Penn. St. 446.

[4] Doe d. Morris *v.* Underdown, Willes, 293; Doe d. Wells *v.* Scott, 3 Maule & S. 300; Hayden *v.* Stoughton, 5 Pick. 528, 537; Gravenor *v.* Hallum, Ambl. 645; Austin *v.* Cambridgeport Parish, 21 Pick. 224.

[5] Doe d. Stewart *v.* Sheffield, 13 East, 526.

[6] Perkins, §§ 566, 567.

[7] Ferguson *v.* Hedges, 1 Harring. 524; Van Kleeck *v.* Ref. Prot. Dutch Church, 20 Wend. 457; State *v.* Whitbank, 2 Harring. 18.

making the will, though a different rule prevails in respect to personal estate; and, consequently, though the devise may not take effect from the disability on the part of the devisee to take, the estate devised will go to the testator's heirs-at-law.[1] But in Massachusetts, Pennsylvania, Virginia, West Virginia, and North Carolina, by statute the residuary devisee would take.[2] In Maine, where the devise was to one upon a condition precedent, which failed for the non-performance of the condition, it was held that the devise passed to the residuary devisee under the residuary clause.[3]

§ 2449. **Lapse of Particular Estate does not defeat Devise of Remainder.** — If an estate be devised to A for life, with a remainder over, after his death, to B, and A die in the lifetime of the testator, the estate will go directly to B upon the death of the testator; the lapsing of the devise to A, in this case, leaving the will to take effect as if it had not been contained in it.[4] A devise was to a wife for life in lieu of her dower, remainder to a daughter. The wife declined to accept the devise, and it was held that the daughter took the estate at the death of the devisor.[5]

§ 2450. **Right of Entry devisable.** — Upon the principle that what is descendible is devisable, it has been held, in some cases by force of statute, and in others upon general principles, that the right of a disseisee to enter and regain the seisin of lands may be devised, and that the devisee may avail himself of the right so acquired.[6]

§ 2451. **Testator's Intention governs Quantity of Estate.** — In construing devises in respect to the estate or interest intended to be given to the devisee, much greater regard is had to the

[1] Van Kleeck *v.* Ref. Prot. Dutch Church, 20 Wend. 457; Greene *v.* Dennis, 6 Conn. 292; Lingan *v.* Carroll, 3 Harr. & M'H. 333. See also 1 Jarm. Wills, Perk. ed. 302, note; Brewster *v.* McCall, 15 Conn. 297.

[2] Prescott *v.* Prescott, 7 Met. 146; Stimson, Am. Stat. Law, § 2822.

[3] Drew *v.* Wakefield, 54 Me. 297.

[4] Lawrence *v.* Hebbard, 1 Bradf. 252; Goodall *v.* McLean, 2 Bradf. 306; Prescott *v.* Prescott, 7 Met. 141.

[5] Macknet *v.* Macknet, 24 N. J. Eq. 277.

[6] 1 Jarm. Wills, 43, 1st Am. ed. and notes; Mass. Pub. St. c. 127, § 26. This is the law in Vermont, Pennsylvania, Virginia, Maine, Alabama, Connecticut, Michigan, Wisconsin, Iowa, Minnesota, Kansas, Missouri, Arkansas, California, Georgia, Mississippi, Illinois, and Ohio. 4 Kent, Com. 512.

intention of the testator than in case of deeds. One reason is, the strong desire there is in all courts to carry out the intention of the devisors when the same can be ascertained by reasonable construction ; and another, that, as wills do not owe their origin to the feudal law, the rule of construction is not necessarily governed by the analogy of that law. It is accordingly held that, in a will, "issue" is either a word of *purchase* or *limitation*, as will best answer the intention of the devisor, though in a deed it is universally taken as a word of *purchase*.[1] But still, except where otherwise provided by statute, as it is in most States under a general devise of a parcel of land to one without any words of inheritance or limitation, he takes only an estate for life.[2] There would be an exception to the above rule in those States where the limitation of an estate by deed, in indefinite terms, carries a fee.[3] Where there was a devise to two as executors, "in and for the consideration" of paying over the rents, etc., to a wife for life, it was held to pass only an estate for life to the devisees named.[4]

§ 2452. **Of Changing Words in Construing Wills.** — In construing wills, it is often necessary, in order to carry out the intention of the testator, for courts to change the words of the will by substituting one for another. Thus a devise upon certain contingencies to "all" the children of *each* of said sons has been held to mean "any." So the word "several," when applied to the death of testator's children, has been held to intend the death of such children "respectively."[5] But the most frequent application of this rule has been in the words "or" and "and," substituting the one for the other. Thus a devise to A and his heirs, and in case of his death under twenty-one, "or" without issue, then over, has been held to mean "and;" it being the obvious intention of the testator that the estate should go over only in case the first-named devisee

[1] Doe *v.* Collis, 4 T. R. 299.

[2] 2 Jarm. Wills, 124, 2d Am. ed. Perkins' note of American cases ; 4 Kent, Com. 537.

[3] See *ante*, § 86.

[4] Bird *v.* Harris, L. R. 9 Eq. 204.

[5] See Turner *v.* Withers, 23 Md. 18, 13 Am. Law Reg. 723–733 as to "survivor" when applied to several children in a devise, meaning "other." In Dexter *v.* Gardner, 7 Allen, 243, the court held "preparatory" to be the same as "preparative" in describing the object of a devise.

died without issue, under the age of twenty-one. Mr. Jarman gives numerous instances of this change in the cases which he has collected; and Mr. Perkins, in his note, has added largely to the number. As an illustration of the converse of the above proposition, there may be mentioned the case of a devise over, if the legatee first named die unmarried "and" without issue, where it was held to intend "or" without issue.[1] So where the devise was to a third person, "if my daughter die before arriving at lawful age, or have no lawful issue;" but if she have lawful issue, then he leaves the whole to her in fee. She died without issue, but not till after arriving at age; and it was held that, upon her arriving at age, she took a fee.[2] A will reciting the intention of testator to go to Cuba, and a wish to make a disposition of his estate if he should not return, and disposing of his property in form, was held a valid testament, although he returned from Cuba, and died, leaving his will unchanged.[3] But it was held otherwise in England; as where a testator recited in his will, that, being about to leave England for China, he declared, that, if anything happened to him while abroad, he wished whatever might be in his possession "at that time" might be disposed of in the mode pointed out. He returned to England and died there. It was held to be a conditional will, depending upon his dying abroad. The court distinguish the case from other English cases which they cite by the testator fixing the *time* when his will is to take effect, — at his death while abroad.[4]

§ 2453. **What Terms in a Devise pass a Fee.** — If the terms of a devise clearly indicate an intention in the devisor to dispose of his entire estate in the property devised, it will be construed to convey a fee.[5] Among the forms of expression,

[1] 1 Jarm. Perk. ed. 414–425; Holcomb *v.* Lake, 25 N. J. L. 605; Grim *v.* Dyar, 3 Duer, 354; Jackson d. Reeves *v.* Topping, 1 Wend. 396; Jackson d. Burnans *v.* Blanshan, 6 Johns. 54.

[2] Johnson *v.* Simcock, 7 Hurlst. & N. 344.

[3] Damon *v.* Damon, 8 Allen, 192.

[4] Goods of Porter, L. R. 2 Prob. & Div. 22, citing as not opposed to this Goods of Dobson, L. R. 1 Prob. & Div. 88. See also the case of Goods of Robinson, L. R. 2 Prob. & Div. 171, confirming that of the Goods of Porter, *supra*, and Goods of Thorne, 4 Swab. & Trist. 36.

[5] Fox *v.* Phelps, 17 Wend. 393; s. c. 20 Wend. 437; 2 Jarm. Wills, 2d Am. ed. 171, note; Baker *v.* Bridge, 12 Pick. 27.

which, when applied to *estates* by a devisor, have been held to indicate such intention, are "all my estate," etc., where the term is not used as a mere description of the premises, but as relating to the ownership of them.[1] So my "landed property" in, etc.,[2] to "A in fee-simple," to "A forever," to "A and his assigns forever," "all my right," and "all my right and title,"[3] would pass a fee.

§ 2454. **Personal Charge creates a Fee in Land devised.** — So where the testator charges upon the devisee the payment of money in respect to the property devised to him, if it is a personal charge, the law will deem the interest that he takes to be a fee, because it assumes that the testator intended to benefit the devisee; whereas, if he only had a life-estate, he might die before he had derived any beneficial fruits of the devise.[4] But still it would not receive that construction if the estate devised was expressly a life-estate.[5] Where one devised lands to his wife, and directed that all his children should be educated and settled according to her discretion, it was held to create a personal charge upon her, and to give her a fee in the same;[6] but it would be otherwise if the payment were charged upon the estate, and not upon the devisee personally.[7]

§ 2455. **Devise of Wild Land conveys a Fee.** — The devise of wild or uncultivated land in Maine or Massachusetts, and probably elsewhere, where the common law prevails, would be construed to pass a fee in the same; for a mere tenant for life

[1] 4 Kent, Com. 540; 2 Jarm. Wills, 2d Am. ed. 181, and Perkins' note of American cases; Brown *v.* Wood, 17 Mass. 68; Den d. Sutton *v.* Wood, Conf. (N. C.) 202; Kellogg *v.* Blair, 6 Met. 322.

[2] Fogg *v.* Clark, 1 N. H. 163; Roe d. Shell *v.* Pattison, 16 East, 221; Mitchell *v.* Mitchell, 1 Ired. 257; 6 Cruise, Dig. 217.

[3] 2 Jarm. Wills, 2d Am. ed. 180; id. 192, and Perkins' note. And see cases collected in Greenleaf's note to 6 Cruise, Dig. 211.

[4] 2 Jarm. Wills, 2d Am. ed. 172, and note; 4 Kent, Com. 540; Bell *v.* Scammon, 15 N. H. 390.

[5] Moore *v.* Dimond, 5 R. I. 121; 2 Jarm. Wills, 126, Perk. ed.

[6] Lloyd *v.* Jackson, L. R. 2 Q. B. 273.

[7] Jackson d. Ruggles *v.* Martin, 18 Johns. 31; Jackson d. Townsend *v.* Bull, 10 Johns. 148; Lindsay *v.* M'Cormack, 2 A. K. Marsh. 229; McLellan *v.* Turner, 15 Me. 436. But in Roy *v.* Rowe, 90 Ind. 54, a devise of land to be sold, and widow to have all that remained for support of self and children, was held to give a fee.

might be guilty of waste in clearing, or might have no benefit in fitting it for cultivation.[1]

§ 2456. **When Devise in Trust passes a Fee.** — Whether a devise in trust shall create a legal estate of inheritance in the trustee or not, depends upon the nature of the trust. If the trust is one which requires him to take a fee, it will be construed accordingly.[2] A devise to an executor to sell is of this class.[3]

§ 2457. **A Fee may be given by Implication,** when the estate bears such a relation to some other estate as to render such a construction a reasonable one; as where the devise was to one "after the death of the testator's wife," it was held to be a remainder in fee to him, and an estate for life, by implication, to the wife. So where the devise was to A, if B died before he was twenty-one years of age: the estate to B was held to be a fee by implication, if he attained the age of twenty-one.[4]

§ 2458. **Devise with Absolute Power of Disposal.** — A devise to one in such a form as implies an absolute right to dispose of the property at pleasure gives a fee;[5] unless the right of disposal is given as a *power* incident to the estate given her. If it is, it does not enlarge the estate given, if less than a fee, into one of inheritance.[6]

§ 2459. **Devise of Rents and Profits same as of Land itself.** — A devise of the rents and profits of land, or the income of land, is equivalent to a devise of the land itself, and will be for life or in fee, according to the limitation expressed in the devise.[7] So a devise of testator's tenements and hereditaments passes

[1] Russell *v.* Elden, 15 Me. 193; Sargent *v.* Towne, 10 Mass. 303.

[2] 4 Kent, Com. 540; *ante,* § 1454.

[3] Innman *v.* Jackson, 4 Me. 237.

[4] 4 Kent, Com. 541, 542; Butler *v.* Little, 3 Me. 239; 2 Jarm. Wills, 2d Am. ed. 175; Ellis *v.* Essex M. Bridge, 2 Pick. 243.

[5] Ramsdell *v.* Ramsdell, 21 Me. 288; Ide *v.* Ide, 5 Mass. 500; Atty.-Gen. *v.* Hall, Fitzg. 314.

[6] Surman *v.* Surman, 5 Mad. 123; Larned *v.* Bridge, 17 Pick. 339; Kuhn *v.* Webster, 12 Gray, 16.

[7] Anderson *v.* Greble, 1 Ashm. 136; Reed *v.* Reed, 9 Mass. 372; Blanchard *v.* Brooks, 12 Pick. 63; Blanchard *v.* Blanchard, 1 Allen, 225; South *v.* Alleine, 1 Salk. 228; 2 Jarm. Perk. ed. 380, and note; Schermerhorne *v.* Schermerhorne, 6 Johns. Ch. 70; Kerry *v.* Derrick, Cro. Jac. 104; Earl *v.* Grim, 1 Johns. Ch. 494; Fox *v.* Phelps, 17 Wend. 402; Diament *v.* Lore, 31 N. J. L. 222; Wood *v.* Griffin, 46 N. H. 234; McClure *v.* Melendy, 44 N. H. 469.

a perpetual rent which had been reserved to the testator.[1] So it is competent for a testator to create a charge upon land he may devise in favor of a third person; and whoever takes the estate would become chargeable therefor, or take the estate charged with the legacy.[2] But the question in such cases turns upon whether the charge is a personal one on the devisee, or is upon the land devised. In the one case, it is no charge upon the land; and in order to create such a charge, it must be clearly declared to be such.[3] And where the devise was to H., by willing that she should take so many acres of land, and pay so much money for it to other persons named, it was held to be a personal charge only, and not a charge upon the land.[4] So the word "produce," when applied to a trust of real and personal estate, may be construed to signify whatever the estate will yield by sale or otherwise.[5] But in these cases there would be an exception to this rule, if the rents, etc., were given for a limited period only.[6]

§ 2460. **Interest of Devisee vests on Death of Testator.** — The interest of a devisee vests immediately on the death of the testator; and, when the will is duly proved, it relates back to that point of time.[7] If, therefore, it be in terms a present one, and nobody is *in esse* capable to take at the testator's death, it is void, as if it be the heirs of J. S., and J. S. be then living; but if it had been in terms deferred to the death of J. S., as to the heir of J. S. after his death, the devise would have been good as an executory devise.[8]

§ 2461. **Of Devises to Beneficiaries not named.** — In view of the law which requires devisees to be sufficiently described to be identified in order to take under a devise, and the invariable doctrine which declares that "undoubtedly every part of a will should be in writing,"[9] questions have arisen how far parol

[1] Van Rensselaer *v.* Read, 26 N. Y. 558.

[2] Steele's Appeal, 47 Penn. St. 437; Swasey *v.* Little, 7 Pick. 296; Felch *v.* Taylor, 13 Pick. 133.

[3] Buchanan's Appeal 72 Penn. St. 448.

[4] Hamilton *v.* Porter, 63 Penn. St. 334.

[5] Newland *v.* Shephard, 2 P. Wms. 194.

[6] Fox *v.* Phelps, 17 Wend. 402; Earl *v.* Grim, 1 Johns. Ch. 494.

[7] *Ex parte* Fuller, 2 Story, 327; Ives *v.* Allyn, 13 Vt. 629. [8] *Ante*, § 1737.

[9] Phila. Bapt. Assoc. *v.* Hart, 4 Wheat. 1; Swinburne, pt. 7, § 7; Hoge *v.* Hoge, 1 Watts, 214.

evidence is competent to establish either a devise or a devisee, or both. In one case, parol evidence was admitted to show that by "my nephew J. G.," mentioned in a will, was meant J. G., the nephew of the testator's wife, and not J. G., the son of his brother.[1] And where a testamentary gift is made to take effect in possession immediately, the objects to whom it was intended to go under the general description in the will are to be ascertained in reference to the time of the death of the testator; but where it is postponed beyond the time of his death, then those who come within the description before the period or event upon which the gift is to take effect, or the distribution to be made, will ordinarily be included as within the probable intention of the testator.[2] The rule requires express words, or a necessary implication, to take an estate from the heir-at-law, and give it to a devisee, under a will.

§ 2462. **Of Parol Evidence to explain Latent Ambiguity.** — But it is often found that, while the devise is in definite terms adequate to describe a person who is to take as devisee, there are extraneous circumstances which render it doubtful who is meant by this description; and, in such case, recourse is often had to parol evidence to ascertain who was intended as the devisee. Thus in a devise to "The Congregational Society in A," and there is more than one, evidence may be offered to show that the testator meant the "first" of these, and the like. So a devise to "The Congregational Foreign Missionary Society" was shown to mean the American Board of Commissioners for Foreign Missions.[3]

§ 2463. **Devise upon an Unlawful Trust.** — It seems, that if a devise be made for the purpose of creating an unlawful trust, as one, for instance, in violation of the law against mortmain, although the same be not declared in the will, the heir-at-law may file a bill against the devisee; and, upon the fact being established, he will be declared to be a trustee for the heir-at-law of the testator.[4]

[1] Grant *v.* Grant, L. R. 2 Prob. & Div. 8.

[2] Worcester *v.* Worcester, 101 Mass. 132.

[3] Howard *v.* Am. Peace Soc., 49 Me. 288.

[4] Tiffany & Bullard, Trusts, 196, 197; Muckleston *v.* Brown, 6 Ves. 52, 67; Lewin, Trusts, 39; Hill, Trust. 164; In re O'Hara, 95 N. Y. 403.

§ 2464. **Of Parol Evidence to prove that Devise was upon Trust.** — So if the devisor intended the devise to enure to the benefit of a particular person, but omitted to name him, in consequence of the one to whom he intended to devise the estate in trust agreeing to hold the property for such intended *cestui que trust*, it would be a fraud on the part of the devisee to claim it as his own; and, upon a bill in equity for that purpose, he would be declared to be trustee for the intended *cestui que trust*.[1]

§ 2465. **Devise to dispose of as Devisee sees fit.** — If on the other hand, the devise be to one absolutely, to be disposed of by him as he shall see fit, the devise is an absolute gift to him, and he can, if he choose, retain the same as his own.[2] The difference between the cases being this: In the two former cases, there were the elements of illegality or fraud in the gift upon which a court of equity might attach a constructive trust; whereas, in the latter, there was no fraud; and, under the statute of frauds, the trust, not being declared in writing, is not susceptible of proof, and of course leaves him with the uncontrolled property and possession of the subject-matter of the devise.

§ 2466. **Of Devises for Indefinite Objects.** — There is still a somewhat different class of cases, which partake of the character of powers as well as of trusts, where, perhaps, the cases are not as distinct and satisfactory; as where, for instance, the devise is to a trustee named, expressly in trust that he shall dispose of it to such purposes as the testator had or should indicate orally to him, or to such persons and in such proportions as the trustee should judge would best meet the wishes of the devisor, or words to that effect, but without indicating them specifically. Now, by the familiar doctrine of powers, if such devise creates a proper power, and the same be properly executed, the appointee, to whom the trustee shall appoint the

[1] Hoge *v.* Hoge, 1 Watts, 214; In re O'Hara, 95 N. Y. 403; Lewin, Trusts, 39, that if trustee agrees to hold upon such trusts as devisee shall declare, and he makes no declaration, he is held to be a trustee for the heir; Hill, Trust. 227, 230; Tiffany & Bullard, Trusts, 189; Morey *v.* Herrick, 18 Penn. St. 128.

[2] Wells *v.* Doane, 3 Gray, 201; Tiffany & Bullard, Trusts, 209, 218; Maskelyne *v.* Maskelyne, Amb. 750; Barford *v.* Street, 16 Vest. 135; Bull *v.* Kingston, 1 Meriv. 314; 2 Sugd. Pow. 173, 3d Am. ed. and note.

estate, takes it under the will as if named therein. And authorities may readily be referred to upon the effect of such a devise. Thus, under the first proposition above stated, it is said, in the authority cited "in the case of an individual, if an estate is devised to such person as the executor shall name, and no executor is appointed, or if, one being appointed, he dies in the testator's lifetime, and no other is appointed, the bequest becomes a nullity; yet such a bequest, if expressed to be for a charity, would be good." In respect to the third proposition, the court, in the case cited, say: "The trust insisted upon here, however, owes its validity, not to the will or the declaration of the testator, but to the fraud of the devisee. It belongs to a class in which the trust arises *ex maleficio*, and in which equity turns the fraudulent procurer of the legal title into a trustee to get at him, and there is nothing in reason or authority to forbid the raising of such a trust from the surreptitious procurement of a devise." The case cited of Wells *v.* Doane gives a full illustration of more than one of the above propositions. The will contained two devises, — one, of the rest and remainder of testator's estate, real and personal, to S. W. during life, and after his death "in such charities as shall be deemed most useful by the executor or administrator of S. W.:" the other was, "that S. W. may dispose of the furniture, etc., absolutely, as he may deem expedient, in accordance with my wishes as otherwise communicated by me to him." In speaking of this last, the court say: "No party denies that he had power to dispose of them by giving them absolutely during his life." The only question was as to the part which he left undisposed of; and it was held that he had an absolute property in these. As to the other bequests, the court say: "We have no doubt that the bequest to charities is valid." They also recognize that there might have been a devise to him for life, with a power of disposal. In Brown *v.* Kelsey, the devise was "for the promotion of such religious and charitable enterprises as shall be designated by a majority of the pastors composing the Middlesex Union Association." They met, and made the appointment; and the devise was sustained accordingly.[1] So a devise to and among

[1] Brown *v.* Kelsey, 2 Cush. 243.

the different institutions, or to any other religious institution or purposes as A and B might think proper, was held to be a good charitable bequest, and not void for uncertainty.[1] In respect to the other part of the subjects above suggested, where property is devised to one expressly in trust, but the persons in whose favor it is intended are not named, or have been only orally named, it is not proposed to do more than refer generally to the authorities. In treatises upon trusts, there are chapters upon the "discretionary powers of trustees," under which numerous cases are collected. Thus, in Tiffany & Bullard on Trusts, c. 6, p. 728, it is said: "In the language of Lord Eldon, there is not only a mere power and a mere trust, but there is likewise known to the court a power with which a party is intrusted, and is required to execute. Such cases arise where the donor has intrusted the party with money or property to be used according to his judgment or discretion, for the use of certain persons or for a class of persons, but nevertheless to be used for others than himself. The discretion of the trustee is not absolute, but confined to the time, manner, or the *particular* individuals of a class." This covers the case of trusts in favor of a class named, but does not, in terms, reach cases where neither classes nor individuals are named in the will as the intended beneficiaries. The reader is also referred to the authorities cited below.[2] And though most if not all of the cases referred to may have been those where the class is mentioned, among whom the discretion is to be exercised, it would seem to be a fair inference, from settled principles and decided cases, that if the property is given to persons named, with a general power of appointing to whom they pleased, or to such as the testator may have orally recommended, the property would vest in them, and the devise would not be void for uncertainty. If no trust was declared, it might leave the matter discretionary with the devisees, and in that way make them the absolute owners. But if it was expressly declared to be in trust that they should appoint, it would create a trust which

[1] Wilkinson *v.* Lindgren, L. R. 5 Ch. Ap. 570.

[2] Lewin, Trusts, 430, 431; 2 Sugd. Pow. 3d Am. 161, 162, note; Brown *v.* Higgs, 8 Ves. 574; Hill, Trust. 67–69 and note.

a court of equity would compel them to execute; which, if they failed to do by reason of death or other disability, the devise would probably fail, and go to the testator's heirs-at-law, unless the class were indicated who were to take, where the court might execute the trust.[1] If it be given as a trust but the objects as beneficiaries are too indefinite to be ascertained, the trustee will not take as owner, but the trust will fail altogether.[2]

§ 2467. **Existing Writing made part of Will by Reference.** — A class of cases ought to be noticed in this connection, where testators have attempted to dispose of property by devise by reference in the will to other papers not executed in conformity to the rules prescribed as to wills, defining who should take, or the description of the property which is to pass by the will, and the like. Thus, in Habergham *v.* Vincent, a testator made his will, giving a remainder to such person as he should appoint by deed. The next day he made a deed reciting his will, and appointing to the sons of C, etc. It was held, that nothing passed under and by the will, and that the deed must be valid in itself, or of no effect.[3] The same doctrine was held in the same case in chancery. Wilson, J., says, "I believe it is true, that if a testator in his will refers expressly to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper, whether executed or not, makes a part of the will, and such reference is the same as if he incorporated it." And the same doctrine is maintained by the court of Pennsylvania.[4] "But when a man declares he will, in some future paper, do something; he says he will make a will as far as his intention is then known to himself, but he will take time to consider what he shall do in future; as a will it is void, because not properly executed." And Buller, J., says, "This last instrument (the deed) must be considered as a codicil;" and then goes on to show that a

[1] See Bull *v.* Bull, 8 Conn. 47; Hill, Trust. Whart. ed. 91; Withers *v.* Yeadon, 1 Rich. Eq. 324, 332; 2 Sugd. Pow. 3d Am. ed. 162, note.

[2] Ellis *v.* Selby, 1 Myl. & Craig, 299.

[3] Habergham *v.* Vincent, 5 T. R. 92. See Goods of Gill, L. R. 2 Prob. & Div. 6

[4] Thompson *v.* Lloyd, 49 Penn. St. 129.

codicil, to be valid, must be executed in the presence of the requisite number of witnesses.[1] The question was fully examined in Johnson *v.* Ball, where it was definitely settled that a testator cannot by his will reserve a power to dispose of an estate at a future time by an instrument not executed as required in the case of wills, so as to take effect under his will.[2] In most States, the statute points out what acts shall operate as a revocation of a will, enumerating the following, i. e., burning, tearing, cancelling, destroying, or obliterating the will, and this done either by the testator or by some one in his presence and by his direction; but expressly declares that the section shall not prevent a revocation implied by law from subsequent changes in the condition or circumstances of the testator.[3]

§ 2468. **Of the Revocation of a Will.** — There are various ways in which a devise may be rendered void or inoperative during the life of the testator; a will, as already stated, being, while the testator lives, ambulatory and inchoate: the will itself may be cancelled or destroyed; its terms as to particular provisions may be changed or annulled by a codicil which is nothing more than an additional will, enlarging or modifying the first, and which must be executed in all respects like the principal will itself; or particular devises in the will may be abrogated or annulled by the act of the testator in respect to the subject of the devise itself. It seems that a testator, having made his will, may make a codicil, and give his wife therein a right to add it to his will at her pleasure; and if she declines to do so, it will be rejected.[4] Acts like these are called "acts of revocation," and the revocation is said to be complete or partial according to the nature of the act. But to revoke a will requires the same exercise of intelligent intention on the part of the testator as the making the instrument at first.[5] A case is stated in the Law Intelligencer of Dec. 6,

[1] 2 Ves. Jr. 204, 228, 231.

[2] Johnson *v.* Ball, 5 De Gex & S. 85; s. c. 9 Eng. L. & Eq. 159. So Thayer *v.* Wellington, 9 Allen, 283.

[3] Mass. Pub. Stat. c. 127, § 8. And see Stimson's Am. Stat. § 2672.

[4] Goods of Smith, L. R. 1 Prob. & Div. 717.

[5] 1 Jarm. Wills, 1st ed. 115, and Perkins' note; 4 Kent Com. 532; Jackson d. Campbell *v.* Holloway, 7 Johns. 81, was a case where the testator altered his

1867, of a will upon which the testator had indorsed in his own handwriting "Cancelled," without signing it. He left it in that state, but not among his other valuable papers, where it was found. It was held to be a revocation. The court, in the case cited, define "revocation" to mean any act done to the will, which, in common understanding, is regarded as a cancellation when done to any other instrument.[1] A similar decision was made by the court of Vermont.[2] But in an earlier case, the testator had written against one of the bequests, and upon the face of the will, "obsolete;" and it was held not to work a revocation.[3] In a case in Ohio, the testator, who was blind, called for his will, which was sealed up; and it was handed to him. He felt of the seal; then handed it to another, and told him to put it in the fire, and burn it. He pretended to do so, burned another piece of paper to make the testator think he had done it, told him he had, but kept it. and put it in his pocket. After testator's death, the will was produced and allowed, and held not to be revoked, as the testator had done none of the acts, which by statute are declared sufficient to revoke a will.[4]

§ 2469. **Revocation by Alienation.** — If the testator, after making his will, convey away the whole or a part of an estate devised therein, it is an entire revocation, or one *pro tanto*, according to the extent of such alienation.[5]

§ 2470. **Revocation by Change in Estate.** — The doctrine upon the subject seems to be, that any change in the estate in the lands devised by the act of the testator, such as a conveyance, though it be to his own use, or though he take back the same estate as he originally held, and continues seised till his death, it will be a revocation. And in one case, where the subject was discussed at length, there was held to be a revoca-

will by interlineations, and a memorandum on the back attested by two witnesses, when three were necessary to a will, and held to be no revocation as to any part of the will. Ford *v.* Ford, 7 Humph. 92, was a case where testator, in an insane fit destroyed his will and it was held no revocation.

[1] Evans's Appeal, 58 Penn. St. 244; Goods of Frazer, L. R. 2 Prob. & Div. 40.

[2] Warner *v.* Warner, 37 Vt. 356, 13 Am. L. Reg. 351.

[3] Lewis *v.* Lewis, 2 Watts & Ser. 455.

[4] Kent *v.* Mahaffey, 10 Ohio St. 204.

[5] 1 Jarm. Wills, 1st Am. ed. 130; Hawes *v.* Humphrey, 9 Pick. 350; 361; Carter *v.* Thomas, 4 Me. 341.

tion in equity of the devise of an estate, which the testator, after devising it, contracted to sell to a third party, but which, the sale never having been consummated, remained in the testator's hands unchanged till his death.[1] The conveyance in the one case, and the bargaining away the estate in the other, are regarded as evidence of an intent to revoke the devise as to such property; and it then becomes requisite, in order for the land to be again the subject of the will, that a republication of this should be made after the testator shall have again acquired the estate.[2] So, where a testator holding, among other property, a mortgage of real estate, made his will, devising thereby all his estate, real and personal, to A. B., and subsequently entered upon the premises and foreclosed the mortgage, it was held to change the nature of the property so as to constitute it after-acquired estate, working a revocation *pro tanto*, and not to pass under the devise.[3] This was before the statute in relation to devises operating upon after-acquired estate.

§ 2471. **Revocation by attempted Conveyance.** — So a conveyance of the land devised may operate a revocation of a devise, as indicating an intention on the part of the testator, although, from some defect in the form of proceeding, it becomes inoperative, as where livery is omitted to be made in a feoffment, or the deed in a bargain and sale is not enrolled, and the like. The estate so devised will, in such a case, go to the testator's heir-at-law.[4] But in several States it is by statute now provided that a conveyance of the land devised does not revoke the devise unless it wholly devests the estate of the devisor; otherwise, the devisee takes subject to the conveyance. And the same is true of any charge or incumbrance on the land devised.[5]

§ 2472. **Revocation by Marriage of Testatrix.** — A revocation of the will of a *feme sole* is implied by the common law by her

[1] Walton *v.* Walton, 7 Johns. Ch. 258, 269, 271; 1 Jarm. Wills, 1st Am. ed. 133; Darley *v.* Darley, 3 Wils. 6, 13; s. c. Ambl. 653; 4 Kent, Com. 527; Arthur *v.* Bockenham, Fitzg. 240; Kean's Will, 9 Dana 25.

[2] Walton *v.* Walton, 7 Johns. Ch. 258, 270. But see M'Craine *v.* Clarke, 2 Murph. 317, as to contract of sale if not executed by death of owner.

[3] Brigham *v.* Winchester, 1 Met. 390.

[4] 4 Kent, Com. 529.

[5] Kentucky, Virginia, New York, Ohio, Indiana, North Carolina, California, Kansas, and West Virginia. See statutes of those States.

subsequent marriage. As a married woman, at common law, could neither make nor revoke a will, it was held that it would defeat the ambulatory character of such an instrument, if a will, made by a *feme sole* before marriage, were to remain valid during coverture.[1] And this rule has been embodied in the statutes of many States; but, since by statute now a married woman may make a will, the alleged reason for the rule fails, and it is held in some States that marriage does not revoke an ante-nuptial will.[2] The reason alleged, however, is probably not the only, nor the main, reason for such an implied revocation, but rather the total change in the situation and circumstances of the testatrix. Accordingly it is held in some States, and seems the better rule, that an implied revocation still exists in such a case.[3] As the doctrine of implied revocation arising from marriage rests upon a supposed intention derived from the altered circumstances of the testatrix, it is difficult to see why, if the testatrix, knowing of her intended marriage, should make a will expressly providing that the marriage shall not act as a revocation of her will, this intention should not have its due weight, if the will is in other respects such as it is competent for a married woman to make.[4]

§ 2473. **Revocation by Marriage of Testator.** — The marriage of a testator does not have this effect unless followed by the birth of a child. The concurrence of these two events, after the making of a will, is supposed to create such a change in the circumstances of the testator that he cannot intend to have his will, as formerly made, stand. [And it is held that where the statute makes the wife the heir of the husband there is the same reason for implying a revocation from marriage alone as there was formerly from marriage and birth of a child.[5]] But this is only a doctrine of presumed revocation, which, at the common law, may be controlled by the character and terms of the will itself.[6] The matter has been largely

[1] 4 Kent, Com. 527.

[2] Fellows *v.* Allen, 60 N. H. 439; In re Tuller, 79 Ill. 99; Webb *v.* Jones, 36 N. J. Eq. 163; Noyes *v.* Southworth, 55 Mich. 173.

[3] Swan *v.* Hammond, 138 Mass. 45; Brown *v.* Clark, 77 N. Y. 369.

[4] Colcord *v.* Conroy, 40 Fla. 97; s. c. 23 So. Rep. 561.

[5] Brown *v.* Scherrer, 5 Colo. App. 255; s. c. 38 Pac. Rep. 427.

[6] 2 Greenl. Ev. § 684; 1 Jarm. Wills, 1st Am. ed. 106; 4 Kent, Com. 521, 523;

regulated, however, in this country, by statute, to which the reader is referred.[1]

§ 2474. **Effect of Omitting to name Children.** — Beside these, there are provisions in the statutes of many if not all of the United States for posthumous children, where none is made in the will of the testator, in some cases avoiding the will altogether; and also in some cases for children not named in the will, when the omission is accidental. But a testator may omit, if he sees fit, to make any provision for any or all of his children, and the will, nevertheless, be a valid one, if he clearly indicates thereby that such was his understanding and intention.[2] But where a child is omitted in a will, the burden of proving that it was intentionally done is on the devisee who claims under the will.[3] A devise to a child or children does not include a grandchild or grandchildren, unless indispensably necessary to effectuate the intent of the testator.[4]

§ 2475. **Revocation by Execution of New Will.** — A new will may operate to revoke a former one, if it contain words to that effect, or if the disposition of the property thereby made is incompatible with that made in the prior will; but should the prior will remain uncancelled, and the latter one be destroyed, it may operate to give effect to the first as a will, if the testator leaves it unrevoked by any new act.[5] But if one make a will, and then by a second will revoke the first, it can only be revived by republishing it. A cancelling of the second will, under such circumstances, does not revive the first; and, in such a case, the deceased was held to have died intestate.[6]

§ 2476. **Devise to an Heir of what would descend to Him.** — At common law, a devise to an heir-at-law of the same estate in quantity or quality as he would take by descent would be

Havens *v.* Van Den Burgh, 1 Denio, 27; Baldwin *v.* Spriggs (Md.), 6 Eastern Rep. 433. See Warner *v.* Beach, 4 Gray, 162.

[1] See compilation of statutes at the end of this chapter.

[2] 4 Kent, Com. 412; id. 521, note, 525, 526; Bancroft *v.* Ives, 3 Gray, 367; Loring *v.* Marsh, 27 Law Rep. 377; Wilson *v.* Fosket, 6 Met. 404; Converse *v.* Wales, 4 Allen, 512.

[3] Ramsdill *v.* Wentworth, 106 Mass. 320.

[4] Sheets *v.* Grubbs, 4 Met. (Ky.) 341; Churchill *v.* Churchill, 2 Met. (Ky.) 466.

[5] 4 Kent, Com. 528, 531. See, as to reviving a revoked will by revoking the latter, Bohanon *v.* Walcot, 1 How. (Miss.) 336.

[6] Brown *v.* Brown, 8 El. & Bl. 876, 888; Wood *v.* Wood, L. R. 1 Prob. & Div. 309.

void, and he would take by descent, and not by purchase. The rule of law is now altered by the statute 3 and 4 Wm. IV., c. 106, § 3, and the heir, in England, takes, in such case, under the devise.[1] A devise by a testator of an estate-tail to his heir-at-law does not affect a descent of the same estate to him in fee as heir.[2] The difference between the present English law and the Roman law is, that whoever takes as devisee or legatee, takes as purchaser; whereas, by the Roman law, the effect of a will was, not to pass the estate of itself, but to designate the person who should take as heir, but who did not take as purchaser.[3] But, in Massachusetts, a devise to an heir-at-law, of the same estate which he would take by descent as heir, is simply void.[4] Where the words "heir," "heirs-at-law," etc., are used in a devise, and it becomes necessary to apply the term, it is held that "heir" intends the person "appointed by law" to succeed to the real estate in case of intestacy, and "heirs-at-law" intend the persons to take, and the shares to be taken, by the statute of distribution of the State, whether this distribution shall be *per stirpes* or *per capita*. Upon this latter point, if a devise be to A and the children of B, they take *per capita*, and not *per stirpes*. So where the devise is to several persons "equally," or "share and share alike," etc., they take *per capita*.[5]

§ 2477. **How a Will once revoked may be revived.** — A will which has been once revoked by implication by any of the modes above mentioned, except cancellation, may be revived by a republication of such will. This may be done in various ways. Thus, if one make a valid codicil to such will, recognizing it in any manner as an existing valid one, it will amount to a republication; or it may be by express republication, as by a re-execution in a form as solemn as that required for its original publication.[6] In Iowa, it requires the same formality

[1] Wms. Real Prop. 181; Whitney *v.* Whitney, 14 Mass. 88, 90; Parsons *v.* Winslow, 6 Mass. 169; 4 Kent, Com. 506; Van Kleeck *v.* Dutch Church, 20 Wend. 469; Willard, Real Est. 477; Ellis *v.* Paige, 7 Cush. 161; Sedgwick *v.* Minot, 6 Allen, 174. And this is the same whether the heir is so designated or as child. Stilwell *v.* Knapper, 69 Ind. 558; Hurst *v.* Winchelsea, 1 W. Bl. 187; Hoover *v.* Gregory, 10 Yerg. 444.

[2] Posey *v.* Budd, 21 Md. 489.

[3] Kaimes' Tracts, 122.

[4] Sedgwick *v.* Minot, 6 Allen, 171.

[5] Richards *v.* Miller, 62 Ill. 424.

[6] 1 Jarm. Wills. 1st Am. ed. 174 and 175, and Perkins' note of cases; 6 Cruise, Dig. 114, 116; Haven *v.* Foster, 14 Pick. 534, 543, 544.

to republish a will which has been once revoked as to execute it at first.[1] So, as has been above stated, the cancellation of a second will may revive a prior uncancelled will. But, by the statute of New York, such will not be the effect unless expressly declared to be so intended by the testator.[2] The effect of a republication of a will by means of a codicil is the same as if the will was made anew of that date.[3]

§ 2478. **No Devise effectual against Consent of Devisee.** — It is hardly necessary to add, that no one can make another the owner of an estate against his consent by devising it to him, so that, if the devisee named disclaim the devise, it becomes inoperative, and goes to the heir ; though it seems to be doubtful whether a mere parol refusal or disclaimer of a devise will be sufficient to prevent the person named as devisee from subsequently claiming it. The difficulty of doing this by anything short of a deed grows out of the presumptive vesting of the devised interest in the devisee before entry.[4] The law presumes an acceptance by a devisee of the devise, if the same is apparently beneficial to him, unless he expressly renounces it ; and, if he enters upon it, he takes it with all its conditions.[5]

NOTE.

The following are the principal statutory provisions in the several States and Territories respecting wills of real property : [6] —

Alabama. — Every person twenty-one years old may devise any descendible interest in lands, tenements, or hereditaments held by him at the time of his death.

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[1] Carey *v.* Baughn, 36 Iowa, 540 ; see Jackson d. Rogers *v.* Potter, 9 Johns. 312 ; 1 Redf. Wills, 374, and cases cited.

[2] 4 Kent, Com. 532. For the general principle, see 6 Cruise, Dig. 121 ; 1 Jarm. Wills, 1st Am. ed. 123 ; Stat. 1 Vict. c. 26, § 22. A will once revoked, to have effect, must be re-executed, or made effective by codicil. The law of New York, Ohio, Indiana, Missouri, and Arkansas, is the same. 6 Cruise, Dig. 121, note.

[3] 6 Greenl. Cruise, Dig. 116, n.

[4] Co. Lit. 111 a ; Wilkinson *v.* Leland, 2 Pet. 627, 655 ; Doe d. Smyth *v.* Smyth, 6 Barn. & C. 112 ; Townson *v.* Tickell, 3 Barn & Ald. 31, 36 ; 4 Kent, Com. 533 ; Webster *v.* Gilman, 1 Story, C. C. 499 ; *Ex parte* Fuller, 2 Story, C. C. 327. That a deed is required, Bryan *v.* Hyre, 1 Rob. (Va.) 94 ; 6 Cruise, Dig. 134, and Greenl. note ; Pickering *v.* Pickering, 6 N. H. 120 ; Tole *v.* Hardy, 6 Cow. 340.

[5] Perry *v.* Hale, 44 N. H. 365.

[6] It has not been thought necessary to repeat the express provision of every State, that a testator must be of "sound mind."

A will is revoked by the subsequent marriage of a testator and the birth of a child, if the wife survive, unless provision has been made for the issue by some gift or settlement or by the will, or the will shows an intention not to make such provision. An unmarried woman's will is revoked by subsequent marriage. A contract for the conveyance of any property devised is not a revocation if any part of the purchase-money remains unpaid at the time of the death of the testator, unless such revocation clearly appears to be intended by the contract or other written instrument, but the property will pass to the devisee subject to specific performance. If a testator, having devised real property, make a conveyance of his interest and acquire a new estate therein, such new estate will pass to the devisee, unless it appear from the will or the instrument conveying the estate that a revocation was intended. A will must be in writing, signed by the testator or by some person in his presence and by his direction, and attested by two witnesses, who must subscribe their names in the presence of the testator. Except as before stated, a will can only be revoked by burning, tearing, cancelling, or obliterating the same with the intention of revoking it by the testator himself or by another in his presence and by his direction, or by some other writing executed with the formalities of a will. And when such destructive act is by another person, the fact must be proved by at least two witnesses. The revocation of a second will does not revive a former, unless by the terms of such revocation it appears that such was the intention of the testator, or the former will be republished. Code, 1896, § 4263 *et seq.*

Alaska. — The laws of Alaska are the same as those in force in Oregon in 1884. 23 U. S. Stat. at Large, 24.

Arizona.—A will may be made by any person of age, or who is or has been married. Any estate, right, title, or interest in possession, reversion, or remainder, which the testator has at the time of his death, may be devised. A will must be in writing, signed by the testator or some other person by his direction and in his presence, and must, if not wholly written by himself, be attested by two or more witnesses over fourteen years old. If wholly written by the testator, no witnesses are required. No will can be revoked except by a subsequent will, codicil, or declaration in writing executed with like formalities, or by the testator destroying, cancelling, or obliterating the same, or causing it to be done in his presence. A legatee or devisee is an incompetent witness. Rev. Stat. 1887, § 3232 *et seq.*

Arkansas. — Competent testators are all persons of the age of twenty-one years and upwards. A will must be subscribed by the testator at the end of the will, or by some person for him at his request, in the presence of each of two witnesses. Or it must be acknowledged by him to have been so made to each of the witnesses, and at the same time he must declare it to be his will. If the will be entirely in the handwriting of the testator, it may be established by the evidence of three witnesses although not attested, but such will will not revoke a properly attested will. If the testator's name be signed by another, such other must sign his own name as a witness and state that he signed the testator's name at his request. No will can be altered or revoked other than by a writing of the testator declaring such revocation and alteration, and executed with the same formalities as a will, or by being burnt, torn, cancelled, obliterated, or destroyed for the purpose of revocation by the testator himself, or by some other person in his presence, by his direction and consent, and when done by another person the facts must be proved by at least two

witnesses. A will devising the whole estate of the testator is revoked by his subsequent marriage and issue therefrom, if the wife or issue survive, unless provision had been made for the issue by settlement or by the will. An unmarried woman's will is revoked by her subsequent marriage. The revocation of a second will does not revive the first will, unless it so appear by the terms of the revocation or the first will be republished. Digest of the Stat. § 7390 *et seq.*

California. — All persons over the age of eighteen years may dispose of every estate and interest in real property by will in writing, which must be subscribed at the end thereof by the testator in writing or by some person in his presence and by his direction, attested by two witnesses or acknowledged by the testator to them, and in either case declared by the testator to the witnesses as his will. Each must sign his name as a witness at the end of the will at the testator's request and in his presence. A holographic will need not be witnessed. Witnesses must write their places of residence, and if another subscribes the testator's name he must also witness the will ; but a violation of this direction will not affect the validity of the will. A will is revoked by a writing of the testator, executed with the formalities of a will declaring such revocation ; or by being burnt, torn, cancelled, obliterated, or destroyed for the purpose of revocation by the testator himself or by some person in his presence and by his direction ; and when the destructive act is by another, the facts must be proved by two witnesses. A will executed in duplicate is revoked by the revocation of one of them. Revocation of a second will does not revive a former, unless the terms of the revocation show such intention, or the first will be republished. Marriage and the birth of a child revoke a will if the testator's wife or issue survive him, unless provision has been made for the issue by some settlement or by the will, or the will show an intention not to make such provision. Subsequent marriage alone will revoke a will if the wife survive the testator, unless provision has been made for the wife by marriage contract or by the will, or the will show an intention not to make such provision. A will executed by an unmarried woman is revoked by her subsequent marriage and is not revived by the death of her husband. An agreement for the conveyance of devised property does not revoke such devise, but the property passes by the will subject to the performance of the agreement. A subsequently acquired estate will pass by will if such appear to be the intention. Civ. Code, 1899, § 1270 *et seq.*

Colorado. — Every male twenty-one years old and every unmarried female eighteen years old may devise any estate, right, title, or interest in possession, reversion, or remainder at the time of his or her death, by will in writing, signed by the testator or some one in his presence and by his direction, attested by two witnesses. Such will shall not be revoked otherwise than by burning, tearing, or obliterating the same by the testator himself or by another in his presence with his consent, or by other will or codicil declaring the revocation. Mills' Annot. Stat. 1891, § 4652 *et seq.*

Connecticut. — All persons eighteen years old may devise their estate belonging to them at death. A will must be in writing, subscribed by the testator, attested by three witnesses, each of them subscribing in his presence ; but any will is valid which is executed according to the laws of the State or country where executed. A devisee or legatee is a competent witness, but the devise or legacy is void unless the will be otherwise legally attested or such witness is an heir of the testator. Marriage or the birth of a child is a revocation, unless the will provide for

such a contingency. No will shall be revoked except by burning, cancelling, tearing, or obliterating it by the testator or by another in his presence by his direction, or by a later will or codicil. Gen. Stat. 1888, § 537 *et seq.*

Delaware. — Any person twenty-one years of age, married women excepted, may devise land, tenements, and hereditaments, although after-acquired, by will in writing, signed by the testator or by some person in his presence and by his direction, attested and subscribed in his presence by two witnesses. Such will cannot be altered or revoked "except by cancelling by the testator, or in his absence and by his express direction," or by a subsequent will, or by a writing signed by the testator or some person in his presence with the formality of a will; but the foregoing shall not preclude an implied revocation. If a testator have no lawful issue at the time of execution, a will making no provision for any child shall, if he leave a child at his death, be revoked. Rev. Code, 1893, c. 84.

District of Columbia. — All lands, tenements, and hereditaments which would descend to heirs, except estates tail, may be disposed of by males of twenty-one years and females of eighteen years, by will in writing, signed by the testator or some other in his presence and by his express direction, attested and subscribed in his presence by three witnesses. A will is not revocable otherwise than by a will or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator, or in his presence by his direction and consent, and any writing of revocation must be signed in the presence of three witnesses. Beneficiaries under the will are competent witnesses, but they cannot take as devisees or legatees. After-acquired property may be devised. Comp. Stat. 1894, c. 70.

Florida. — Every person twenty-one years old may dispose of every estate, right, title, and interest in real property in possession, reversion, or remainder, although after-acquired, by will signed by the testator, or by another in his presence and by his express direction, attested and subscribed in his presence by two witnesses. A will may be revoked by another writing signed by the testator declaring the same to be revoked, or operating as a revocation thereof by law, or by burning, cancelling, tearing, or obliterating the same by the testator or by his direction and consent, or by the act and operation of law. Rev. Stat. 1892, § 1792 *et seq.*

Georgia. — Any person over fourteen years of age may make a will in writing disposing of real property. Such will must be signed by the testator or by another person in his presence and by his express direction, and attested and subscribed in his presence by three witnesses. A legatee or devisee is a competent witness, but the legacy or devise is void. No person leaving a wife or issue can devise more than one third of his estate to any charitable or public use, and in all cases a will containing such devise is void unless executed at least ninety days before the death of the testator. After-acquired property may be devised. An express revocation by written instrument must be executed with the formality of a will. The destruction of a will revoking a former will does not revive the former unless it be republished. Revocation may be effected by any destruction or obliteration of the original will or a duplicate done by the testator or by his direction, with an intention to revoke. Marriage of the testator, or the birth of a child to him, revokes a prior will in which no provision is made for such a contingency. Code, 1895, § 3253 *et seq.*

Idaho. — Every person over the age of eighteen years may dispose of his real property by will in writing, subscribed at the end thereof by the testator or by some person who, in his presence and by his direction, subscribes his name thereto, such subscription to be made in the presence of attesting witnesses, or to be acknowledged by the testator to them to have been made by him or by his authority. The testator must at the same time declare to the attesting witnesses that the instrument is his will. There must be two witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request and in his presence. A witness must write his place of residence, and one who subscribes the testator's name by his direction must write his own name as a witness; but a violation of this provision will not affect the validity of the will. Except by operation of law, a will can only be revoked or altered by a written will or other writing of the testator declaring such revocation or alteration, and executed with the formalities of a will; or by being burnt, torn, cancelled, obliterated, or destroyed for the purpose of revocation by the testator himself, or by some person in his presence and by his direction; and if the destroying act is by another person, it must be proved by two witnesses. A will executed in duplicate may be revoked by revoking one of the duplicates. The revocation of a second will will not revive the prior, unless such intention appear from the terms of the revocation, or unless the first will is duly republished. Marriage and the birth of a child and the survival of wife or issue after the death of the testator revoke a will made prior to marriage, unless provision has been made for the issue by settlement or in the will, or the will shows an intention not to make such provision. Marriage alone revokes a will if the wife survive the testator, unless provision has been made for her by marriage contract, or she is provided for in the will, or the will shows an intention not to make such provision. An agreement made by the testator for the sale of devised property does not revoke such devise, but the property will pass subject to the rights of the purchaser. After-acquired property may be devised. No devise to a charitable use is valid unless the will be executed at least thirty days before the death of the testator, and such devises and bequests must not collectively exceed one third of the estate of a testator leaving lineal descendants. If such devises and bequests collectively exceed one third of the estate of the testator, a *pro rata* deduction must be made so as to reduce the aggregate thereof to one third. Rev. Stat. 1887, § 5725 *et seq.*

Illinois. — Every male twenty-one years old and every female eighteen years old may devise all the estate, right, title, and interest in possession, reversion, or remainder which he or she has, at death, in any lands, tenements, or hereditaments, annuities or rents, charged upon or issuing out of them, by will in writing, signed by the testator or by another in his presence and by his direction, attested in the presence of the testator by two witnesses who saw the testator sign in their presence, or to whom the testator acknowledged the same to be his act and deed. A devise to a witness is void unless the will be otherwise sufficiently attested, or unless such witness is an heir, in which case so much of his share as heir shall be saved to him as shall not exceed the value of the devise. No will shall be revoked otherwise than by burning, cancelling, tearing, or obliterating the same by the testator, or in his presence by his direction and consent, or by some other will declaring the revocation; and no spoken words shall revoke a will. Rev. Stat. 1889, c. 148.

Indiana. — Any person, except an infant, may devise any descendible interest by will in writing, signed by the testator or by some one in his presence with his consent, attested and subscribed in his presence by two witnesses. No will shall be revoked unless the testator, or some person in his presence and by his direction, with intent to revoke, shall destroy or mutilate the same, or the testator shall execute another writing for that purpose, with the formalities of a will. Revocation of a second will will not revive a former, unless such intention appear from the terms of the revocation, or the first will be duly republished. Birth of a child revokes a prior made will, unless the will contain provision for said child. An unmarried woman's will is revoked by her subsequent marriage. A contract for the conveyance of devised land does not revoke the devise unless such revocation appear from the contract. A conveyance of the testator's interest in devised property, and his acquisition of a new estate therein, will not revoke the devise, unless such intention appear from the will or by the conveyance of the testator's interest, or by the instrument under which his new estate is acquired. A devise to a subscribing witness is void unless the will be otherwise sufficiently attested, or unless such witness is an heir; in which case so much of his share as heir shall be saved to him as shall not exceed the value of the devise. Rev. Stat. 1894, c. 9.

Iowa. — Any person of full age may dispose of all his property by will, subject to homestead and marital rights, except that no devise to a charitable use shall be valid in excess of one fourth of the testator's estate after payment of debts, if a spouse, child, or parent survive. After-acquired property may be devised. A will must be in writing, signed by the testator, or by some person in his presence and by his express direction writing his name thereto, witnessed by two persons. A devise to a witness is void unless the will be otherwise sufficiently attested or unless such witness is an heir, in which case so much of his share as heir shall be saved to him as shall not exceed the value of the devise. Wills can only be revoked by being cancelled or destroyed by the action or direction of the testator, with the intent to revoke, or by the execution of a subsequent will. When done by cancellation, the revocation must be witnessed in the same manner as the making of a will; but the subsequent birth of a legitimate child to the testator before his death will operate as a revocation. Code, 1897, § 3270 *et seq.*

Kansas. — Any person of full age may devise any interest in real property by will, in writing, signed at the end thereof by the testator or by some other person in his presence and by his express direction, attested and subscribed in the presence of the testator by two witnesses who saw the testator subscribe or heard him acknowledge the same. The provision as to devisees being witnesses is the same as that of Iowa. Wills executed according to the laws of any other State or Territory, or of any foreign country, are valid under certain restrictions as to the probating of wills executed according to the laws of foreign countries. A testator's contract to convey land devised is not a revocation. A will is revoked by a testator tearing, cancelling, obliterating, or destroying the same with intention to revoke, by himself, or by some other person in his presence or by his direction, or by some writing executed with the formalities of a will. Revocation of a second will will not revive the former, unless such intention appear by the terms of the revocation, or unless the first will be duly republished. After-acquired property may be devised. Gen. Stat. 1897, c. 110.

Kentucky. — All persons twenty-one years of age, except married women, may dispose of any estate, right, or interest in real property that he may be entitled to

at death which would otherwise pass to his heirs, although he may become so entitled after the execution of the will, by will in writing, with the name of the testator subscribed thereto by himself or by some other person in his presence and by his direction. If such will is not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of two witnesses, who shall subscribe the will with their names in the presence of the testator. Every will is revoked by marriage of the testator, except certain wills made in the exercise of a power of appointment. Except as stated, no will can be revoked except by a writing declaring such intention, and executed with the formalities of a will, or by the testator or some person in his presence and by his direction cutting, tearing, burning, obliterating, cancelling, or destroying the same or the signatures thereto with the intent to revoke. No revoked will can be revived otherwise than by a re-execution thereof, or by a codicil. No conveyance subsequent to the execution of a will shall, of itself, prevent its operation with respect to such interest devised as the testator may have power to dispose of at the time of his death. The provision as to devisees being witnesses is the same as in Iowa. Stat. 1894, c. 135.

Louisiana. — In this State, wills are matters of such importance, and the formalities required are so numerous and so radically different from those of the other States in this country, that it is generally conceded that a statement of the law is without value to any but a Louisiana lawyer. It is therefore omitted here.

Maine. — Any person twenty-one years old may dispose of his real estate by will in writing, signed by him or by some person for him at his request and in his presence, and subscribed in his presence by three witnesses not beneficially interested thereunder. Such will is valid until destroyed, altered, or revoked by being intentionally burnt, cancelled, torn, or obliterated by the maker or by some person by his direction and in his presence, or by a subsequent writing executed as a will; or revoked by operation of law from subsequent changes in the condition and circumstances of the maker. After-acquired property may be devised. Rev. Stat. 1883, c. 74.

Maryland. — Males twenty-one years old and females eighteen years old may dispose of any descendible real property except estates tail, by will signed by the testator or by some other person in his presence and by his express direction, attested and subscribed in the presence of the testator by two witnesses. No will is revocable otherwise than by some other will or codicil in writing, or other writing, declaring the same; or by burning, cancelling, or obliterating the same by the testator himself, or in his presence by his direction and consent. Wills made out of the State are valid if made according to the law of the place where made. After-acquired property may be devised. Pub. Gen. Laws, 1888, p. 414.

Massachusetts. — Every person of full age may dispose of all his descendible property, except estates tail, by will in writing, signed by him or by some person in his presence and by his express direction, attested and subscribed in his presence by three witnesses. A devise to a subscribing witness or to the husband or wife of such witness is void unless the will is otherwise fully attested. A will made out of the State is valid if made according to the law of the State where made. No will shall be revoked unless by the burning, cancelling, tearing, or obliterating of the same, with the intention of revocation, by the testator himself, or by some

other person in his presence and by his direction, or by some other writing signed, attested, and subscribed in the same manner that is required in the case of a will, or by implication of law. Pub. Stat. 1882, c. 127.

Michigan. — Every person of full age may dispose of any descendible property by will in writing, signed by the testator or by some person in his presence and by his express direction, attested and subscribed in the presence of the testator by two witnesses. A devise to a subscribing witness is wholly void unless the will is otherwise fully attested, but if such witness is also an heir, then so much as would have descended to him as will not exceed the devise shall be saved to him. After-acquired property may be devised. The law as to revocation is the same as in Massachusetts. Howell's Annot. Stat. 1882, c. 220.

Minnesota. — Any person of full age may make a will of real property in writing signed at the end thereof by the testator or by some person in his presence and by his express direction, attested and subscribed by two witnesses. The law as to revocation is the same as in Massachusetts. After-acquired property may be devised. A devise to a subscribing witness is void unless the will is otherwise fully attested, except that if the witness is also an heir, so much of the estate as would have descended to him, not to exceed the devise, shall be saved to him. Stat. 1891, § 5627 *et seq.*

Mississippi. — Every person twenty-one years of age, married or unmarried, may dispose of any estate, right, title, or interest in possession, reversion, or remainder, at the time of his or her death, by will in writing, signed by the testator or by some person in his or her presence and by his or her express direction, and if not wholly written and subscribed by the testator, the will must be attested by two witnesses in the presence of the testator. No devise shall be revocable except by the testator destroying, cancelling, or obliterating the same, or causing it to be done in his presence ; or by a subsequent will, codicil, or declaration in writing ; but every last will and testament made when the testator or testatrix had no child living, wherein any child he or she might have is not provided for or not mentioned, if at the time of his or her death he or she have a child, or if the testator leave his wife *enceinte* of a child who shall be born, shall have no effect during the life of such after-born child, and shall be void unless the child die without having been married, or without leaving issue capable of inheriting, and before he or she shall have attained twenty-one years. And when the testator shall leave children born and his wife *enceinte*, the posthumous child or children, if unprovided for by settlement, and neither provided for nor disinherited, but only pretermitted by the last will and testament, shall succeed to the same portion of the father's estate as such child or children would have been entitled to if the father had died intestate, towards raising which portion the devisees and legatees shall contribute proportionably out of the parts devised and bequeathed to them by the same will and testament. Devises to religious and charitable uses are void. A person who wilfully causes the death of another cannot take under his will. Annot. Code, 1892, c. 145.

Missouri. — Males twenty-one years old, and females, married or unmarried, eighteen years old, may devise real property by will in writing, signed by the testator or by some person, by his direction, in his presence, attested by two witnesses, subscribing in the presence of the testator. Except as hereafter mentioned, no will

shall be revoked except by a subsequent will in writing, or by burning, cancelling, tearing, or obliterating the same, by the testator, or in his presence and by his consent and direction. If after disposing of his whole estate by will the testator marry and die leaving issue by such marriage, living at the time of his death, or leave posthumous issue, the will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will. An unmarried woman's will is revoked by her subsequent marriage. The revocation of a second will shall not revive the prior, unless such intention appear from the terms of the revocation, or the first will be republished. A devise to an attesting witness is void unless such witness be an heir, when so much of the estate as would have descended to him shall be saved to him, not to exceed the value of the devise, or unless the will be otherwise fully attested. Rev. Stat. 1899, c. 63.

Montana. — Any person eighteen years old may devise real property by will in writing, subscribed at the end thereof by the testator himself or by some person in his presence and by his direction, in the presence of two witnesses, or acknowledged by the testator to such witnesses to have been made by him or by his authority. Testator must declare to the witnesses that the instrument is his will, and they must sign their names as witnesses at the end of the will at testator's request and in his presence. Witnesses must write their addresses, and a person who subscribes testator's name by his direction must also sign as a witness; but a violation of this provision will not affect the validity of the will. Creditors are competent witnesses, but a devise to a witness is void unless the will is otherwise sufficiently attested, or the witness is an heir, when he will succeed to so much of the estate as would be distributed to him not exceeding the devise. A will made out of this State is valid if made according to the law of the domicil of the testator. No will can be revoked or altered other than by a writing having the formalities of a will, or by being burned, torn, cancelled, obliterated, or destroyed with the intention to revoke, by the testator himself, or by some person in his presence and by his direction; or by implication of law. If the destroying act be by another person than the testator, it must be proved by two witnesses. A will executed in duplicate may be revoked by revoking one of the duplicates. A prior does not revoke a subsequent will, unless the latter contain an express revocation or provisions wholly inconsistent with the terms of the former. Revocation of a second will will not revive a prior, unless such intention appear from the terms of the revocation, or the first will be republished. After-acquired property may be devised. A will devising or bequeathing property to charitable uses must be executed thirty days prior to death; and no such devises or bequests shall collectively exceed one third of the estate of the testator leaving heirs. If, after having made a will, the testator marries and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survive him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision. If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show intention not to make such provision. A will executed by an unmarried woman is revoked by her subsequent marriage and is not revived by the death of her husband. Codes and Stat. 1895, p. 617.

Nebraska. — Every person of full age may devise any descendible estate by will in writing, signed by the testator or by some person in his presence and by his express direction, attested and subscribed in the presence of the testator by two witnesses. After-acquired property may be devised. A devise to a witness is void, unless the will is otherwise fully attested, or unless such witness be an heir; in which case so much of the estate as he would have been entitled to by descent, not to exceed the devise, shall be saved to him. No will shall be revoked except by burning, tearing, cancelling, or obliterating the same with the intention of revoking it by the testator, or by some person in his presence and by his direction, or by some writing executed with the formalities of a will, or by implication of law. Comp. Stat. 1899, § 2637 *et seq.*

Nevada. — Every person over the age of eighteen years may dispose of real property by will in writing, signed by the testator and sealed with his seal, or by some person in his presence and by his express direction, attested by two witnesses subscribing in the presence of the testator. A devise to a subscribing witness is void unless the will is otherwise fully attested. The law as to intentional revocation is the same as in Montana; also as to the revival of a prior will by the revocation of the second. If a testator marry, and the wife be living at his death, the will shall be deemed revoked, unless she shall be provided for in the will or in some way mentioned therein to show an intention not to make such provision. An unmarried woman's will is revoked by marriage and is not revived by the death of her husband. An agreement to convey property devised is not a revocation of the devise. Gen. Stat. 1885, § 3000 *et seq.*

New Hampshire. — Every person twenty-one years old may dispose of real property by will in writing, signed by the testator or by some person in his presence and by his express direction, attested and subscribed in his presence by three witnesses. No seal is required. A devise to an attesting witness is void, unless the will be otherwise fully attested. A will is valid in this State if valid according to the laws of the State where executed. After-acquired property may be devised. The law as to revocation is the same as in Massachusetts. Pub. Stat. 1901, c. 186.

New Jersey. — Any person twenty-one years old may devise real property by will in writing, signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him and such writing declared to be his last will in the presence of two witnesses present at the same time, who shall subscribe their names as witnesses in the presence of the testator. A witness cannot take as devisee. After-acquired property may be devised. A written revocation must be executed with the same formality as a will. Gen. Stat. 1895, p. 3757.

New Mexico. — Any person twenty-one years old may dispose of all of his property by oral or written will. When in writing, the will is to be signed by the testator, who, if unable or not knowing how to sign, shall request some reliable person to sign for him, and it shall be attested by two witnesses. A verbal will shall be attested by the same number of witnesses required for written wills, and, besides, two witnesses, there being no more, to testify that the testator, male or female, was in possession of a sound mind and entire judgment. Devisees cannot be witnesses. Witnesses must be present, see the testator sign, or see some one sign it for him, at his request, as and for his last will; and must sign as witnesses at his request, in his presence and in the presence of each other. A will may

be revoked by an instrument in writing, executed with the formalities of a will, containing an express revocation, or by a subsequent valid will disposing of the same property covered by the first will, although the later will contained no reference to the first. Annulling a second will which annulled a first does not validate the first, unless its validity be acknowledged. Power to make a will may be delegated by an instrument executed with the formalities of a will. Comp. Laws, 1897, § 1946 *et seq.*

New York. — All persons of full age may dispose of their real estate by will in writing, subscribed by the testator at the end, such subscription to be made by the testator in the presence of each of two witnesses, or acknowledged by him to have been made to each of the attesting witnesses. The testator at the same time shall declare the instrument to be his last will. Each witness must sign his name as a witness at the end of the will at the request of the testator, and each witness must write opposite his name his place of residence ; and every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will ; but the omission of the foregoing provision shall not affect the validity of the will. The law as to revocation other than by implication of law is the same as in Massachusetts. The law as to revocation by marriage and birth of issue is the same as in Missouri. An unmarried woman's will is revoked by marriage. A contract to convey, or a charge or incumbrance, is not a revocation by implication of a devise. Devise to a witness is void unless the will be otherwise fully attested ; but if the witness be an heir, he may take by descent not to exceed the devise. Cancellation of a second will does not revive a former, unless the intention be expressed or the former will be republished. After-acquired property may be devised. Rev. Stat. (9th ed.) p. 1875.

North Carolina. — Any person twenty-one years old may dispose of real property by will, written in the testator's lifetime, and signed by him or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses, no one of whom shall be interested in a devise ; or by will found among the valuable papers or effects of the testator, or which shall have been lodged in the hands of any person for safe keeping, and the same shall be in the handwriting of such testator, with his name subscribed thereto or inserted in some part of the will ; and if such handwriting shall be proved by three credible witnesses, who verily believe that such will and every part thereof is in the handwriting of the person whose will it appears to be, then such will shall be sufficient to convey real estate. After-acquired property may be devised. A devise to an attesting witness or to the husband or wife of such witness is void. No will shall be revocable otherwise than by a writing declaring the same, executed with the formalities of a will, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his direction and consent. Every will is revoked by the marriage of the testator, except a will made in the exercise of certain powers of appointment. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. Code, 1883, c. 54.

North Dakota. — Every person over the age of eighteen years may dispose of his or her real property by will in writing, which, if holographic, need not be witnessed, but if not holographic, must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto. The subscription must be made in the presence of the attesting witnesses, or be

acknowledged by the testator to them to have been made by him or by his authority, and at the same time the testator must declare to the attesting witnesses that the instrument is his will ; and there must be two witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request and in his presence. Each witness must write his place of residence, and a person who subscribes a testator's name must write his own name as a witness, but a violation of this provision does not affect the validity of the will. A will or a revocation thereof made out of this State is valid if made according to the law of the place where made, or in which the testator was at the time domiciled. No will can be revoked or altered otherwise than as herein stated, which may be by a writing of the testator declaring such revocation or alteration, and executed with the formalities of a will, or by being burnt, torn, cancelled, obliterated, or destroyed with intent to revoke, by the testator himself, or by some person in his presence and by his direction, and when the destructive act is committed by another than the testator the fact must be proved by two witnesses. The revocation of a will executed in duplicate may be made by revoking one of the duplicates. A prior will is not revoked by a subsequent, unless the latter contains an express revocation or provisions wholly inconsistent with the terms of the former. The revocation of a revoking will does not revive the former, unless the intention appear by the terms of such revocation, or unless the former will be duly republished. The will of an unmarried woman is revoked by marriage, and is not revived by her husband's death. An agreement to sell devised property is not a revocation, nor is a charge or incumbrance. If after having made a will the testator marry and have issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show intention not to make such provision ; and no other evidence to rebut the presumption of such revocation can be received. If after making a will the testator marries and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will or in such way mentioned therein as to show an intention not to make such provision ; and no other evidence to rebut the presumption of revocation must be received. A beneficial devise to a subscribing witness is void unless there are two other competent witnesses, or unless such attesting witness be an heir, in which case he may take as heir not to exceed the devise. No person who has been finally convicted of feloniously causing the death of another can take under such other's will. After-acquired property may be devised. Rev. Code, 1895, § 3639 *et seq.*

Ohio. — Any person of full age and not under any restraint may dispose of real property by will in writing, signed at the end by the testator or by some other person in his presence and by his express direction, attested and subscribed in the presence of the testator by two witnesses who saw the testator subscribe or heard him acknowledge the same. If a testator die leaving issue of his body or an adopted child living, or the legal representatives of either, any devise to charitable uses shall be invalid unless the will shall have been executed one year prior to the testator's death. A devise to a witness is void unless the will can be proved otherwise than by the testimony of such witness. But if such witness is heir, he may take as heir not to exceed the devise. A will shall be revoked by the testator

burning, tearing, cancelling, or destroying the same with the intention of revoking it, by the testator himself, or by some person in his presence or by his direction, or by some other will or codicil, or writing executed with the formality of a will, or by implication of law. A devise is not revoked by an agreement to convey, or by a charge or incumbrance, or by a partial conveyance. An unmarried woman's will is not revoked by marriage. If a testator have no children at the time of executing his will, but shall afterward have a child living or born alive after his death, such will shall be deemed revoked, unless provision shall have been made for the child by settlement or in the will, or the child is so mentioned in the will as to show an intention not to make such provision. The revocation of a revoking will does not revive the former will, unless such intention appear from the terms of the revocation, or unless the prior will be duly republished. Rev. Stat. 1896, § 5914 *et seq.*

Oklahoma. — The law in this Territory is the same as that in North Dakota. Stat. 1893, § 6165 *et seq.*

Oregon. — Every person twenty-one years old may devise real property by will in writing, signed by the testator or by some other person under his direction and in his presence, attested by two witnesses subscribing their names to the will in the presence of the testator. Every person who shall sign the testator's name at his direction shall subscribe his own name as a witness, and state that he subscribed the testator's name at his request. If a testator dispose of his entire estate and then marry, and die leaving issue by such marriage living at the time of his death, or leaving posthumous issue, the will shall be deemed revoked, unless provision shall have been made for such issue by settlement or in the will. An unmarried woman's will is revoked by marriage. A devise is not revoked by a covenant to convey or by a charge or incumbrance. The revocation of a revoking will does not revive the first will, unless such intention appear by the terms of the revocation, or unless the first will be duly republished. The will of one not an inhabitant of this State is valid if executed and proved according to the law of the State where proved. A devise to an attesting witness is void unless the will be otherwise fully attested, but such witness, if an heir, may take by descent not to exceed the devise. Hills' Annot. Laws, 1887, § 3066 *et seq.*

Pennsylvania. — Any person twenty-one years of age may devise real property by will in writing, which, unless the person making the same shall be prevented by the extremity of his last illness, shall be signed by him at the end thereof, or by some person in his presence and by his express direction, and proved by the oaths or affirmations of two witnesses. A testator may make his cross or mark. After-acquired property may be devised. An unmarried woman's will is revoked by marriage, and is not revived by the death of her husband. No will in writing concerning any real estate shall be repealed, nor shall any devise or direction therein be altered, otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved in the same manner as is hereinbefore provided, or by burning, cancelling, obliterating, or destroying the same by the testator himself, or by some one in his presence and by his express direction. When any person shall make his last will and testament, and afterwards shall marry or have a child or children not provided for in such will, and die, leaving a widow and child, or either a widow or child or children, although such child or children be born after the death of their father, every such person,

so far as shall regard the widow, or child or children after born, shall be deemed and construed to die intestate; and such widow, child or children, shall be entitled to such purparts, shares, and dividends of the estate, real and personal, of the deceased, as if he had actually died without any will. Pepper & Lewis' Digest, 1894, col. 1438.

Rhode Island. — Every person of the age of twenty-one years may dispose of all of his descendible real property except estates tail, by will signed by the testator, or by some other person for him in his presence and by his express direction, and such signature shall be made and acknowledged by the testator in the presence of two witnesses present at the same time, and such witnesses shall attest and subscribe the will in the presence of the testator; but no form of attestation and no other publication shall be necessary. Every will made by a man or woman shall be revoked by his or her marriage, except a will made in the exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, executor, or administrator, or the person entitled as his or her next of kin under the statute of distribution. No will or codicil or any part thereof shall be revoked otherwise than as provided in the preceding section, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed, or by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. No will shall be revoked by any presumption of intention on the ground of an alteration in circumstances. When a testator omits to provide in his will for any of his children or for the issue of a deceased child, they shall take the same share of his estate that they would have been entitled to if he had died intestate, unless it appears that the omission was intentional, and not occasioned by accident or mistake. When a child of a testator, born after his father's death, has no provision made for him by his father in his will or otherwise, he shall take the same share of his father's estate that he would have been entitled to if his father had died intestate. A devise to a witness is void. A will executed without this State is valid if executed within the United States, and according to the law of the State, Territory, or district where executed or in which the testator was then domiciled. Gen. Laws, 1896, c. 203.

South Carolina. — Any person of full age may dispose of real property by will in writing, signed by the testator or by some other person in his presence and by his express direction, attested and subscribed in the presence of the testator and of each other by three witnesses. A devise to a subscribing witness or to the husband or wife of such witness is void, except that where such devisee is an heir the devise is good to the extent to which such devisee could take as heir. No will shall be revoked but by some writing declaring the same, executed with the formality of a will, or by destroying or obliterating the same by the testator himself, or by some other person in his presence and by his direction and consent. After acquired property may be devised. If any person making a will shall afterwards marry and die, leaving his widow or leaving issue of such marriage, unless the will shall have been made in contemplation of marriage expressed on its face, and shall contain a provision for future wife and children, if any, it shall be deemed and taken to be a revocation to all intents and purposes. Rev. Stat. 1893, § 1977 *et seq.*

South Dakota. — The law in South Dakota is the same as in North Dakota. Annot. Stat. 1899, § 4494 *et seq.*

Tennessee. — The law as to the execution of wills and testamentary capacity is the same as in North Carolina. Code, 1896, § 3895 *et seq.*

Texas. — Every person twenty-one years old, or who may have been lawfully married, may devise any estate in real property in possession, reversion, or remainder at death, by will in writing signed by the testator, or by some other person by his direction and in his presence, which shall, if not wholly written by the testator, be attested by two witnesses over fourteen years old subscribing their names thereto in the presence of the testator. If the will is holographic the attestation of subscribing witnesses may be dispensed with. No will shall be revoked except by a subsequent will, codicil, or declaration in writing executed with like formality, or by the testator destroying, cancelling, or obliterating the same, or causing it to be done in his presence. A devise to a witness is void, but the witness may take as heir not to exceed the value of the devise. However, if the evidence of the subscribing witnesses be corroborated by the testimony of one or more other disinterested persons, the devise to such subscribing witnesses shall not be void. Every last will and testament made when the testator had no child living, wherein any child he might have is not provided for or mentioned, if at the time of his death he shall leave a child, or leave his wife *enceinte* of a child which shall be born, shall have no effect during the life of such after-born child, and shall be void unless the child die without having been married and before he shall have attained the age of twenty-one years. Batts' Civ. Stat. 1895, art. 5333 *et seq.*

Utah. — The law in this State is substantially the same as in North Dakota, except that every will must be signed by the testator himself. Rev. Stat. 1898, § 2731 *et seq.*

Vermont. — Every person of age may dispose of real estate by will in writing, signed by the testator, or by the testator's name written by some other person in his presence and by his express direction, attested and subscribed by two witnesses in the presence of the testator and of each other. After-acquired property may be devised. A devise to an attesting witness or the husband or wife of such witness is void. No will shall be revoked, except by implication of law, otherwise than by some will, codicil, or other writing, executed as provided in case of wills; or by burning, tearing, cancelling, or obliterating the same, with the intention of revoking it, by the testator himself, or by some other person in his presence and by his express direction. A will made out of the State, which might be proved and allowed by the laws of the State or country in which it was made, may be proved, allowed, and recorded in this State, and shall then have the same effect as if executed according to the laws of this State. Stat. 1894, c. 113.

Virginia. — Every person twenty-one years old may dispose of real property by will. No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and, moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. Every will made by a

man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative, or next of kin. No will or codicil, or any part thereof, shall be revoked, unless under the preceding section, or by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence and by his direction, cutting, tearing, burning, obliterating, cancelling, or destroying the same, or the signature thereto, with the intent to revoke. No will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown. Code, 1887, § 2512 *et seq.*

Washington. — After-acquired property may be devised. Marriage revokes a prior made will if the wife survive the testator, unless she has been provided for by marriage settlement, or in the will, or is therein mentioned in such way as to show an intention not to make provision for her. In other respects the law is substantially the same as in Oregon, except that there is no provision for revocation by marriage and birth of issue. Ballinger's Codes & Stat. 1897, § 4594 *et seq.*

West Virginia. — In this State the law is the same as in Virginia. Code, 1889, c. 77.

Wisconsin. — Every person of full age and any married woman eighteen years old may dispose of any descendible interest in lands, although after-acquired, by will in writing signed by the testator, or by some person in his presence and by his express direction, attested and subscribed in the presence of the testator by two witnesses. Wills made without this State are valid if executed according to the laws of the State in which executed. A devise to a subscribing witness is void unless there are two other witnesses, but such witness may take by descent not to exceed the devise. No will, nor any part thereof, shall be revoked, unless by burning, tearing, cancelling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction, or by some other will or codicil in writing, executed as prescribed above, or by some other writing, signed, attested, and subscribed in the manner provided above for the execution of a will; excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator. The power to make a will implies the power to revoke the same. Sanborn & Berryman's Annot. Stat. 1899, § 2277 *et seq.*

Wyoming. — Every person twenty-one years old is competent to make a will. After-acquired property may be devised. All wills to be valid must be in writing or typewritten, witnessed by two competent witnesses, and signed by the testator or by some person in his presence and by his express direction, and if the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will. No subscribing witness to any will can derive any benefit therefrom unless there be two disinterested and competent witnesses to the same, but if without a will, such witness would be entitled to any portion of the testa-

tor's estate, such witness may still receive such portion to the extent and value of the amount devised, and any typewritten wills which may have been executed prior to February sixth, eighteen hundred and ninety-five, shall be admitted to probate, notwithstanding the fact that they are typewritten, if in all other respects they are legally executed. No will or any part thereof shall be revoked unless by burning, tearing, cancelling, or obliterating the same with the intention of revoking it, by the testator or some person in his presence and by his direction, or by some other will or codicil in writing, signed, attested, and subscribed in the manner provided by law for the execution of a will, excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator. The power to make a will implies the power to revoke the same. Rev. Stat. 1899, § 4565 *et seq.*

APPENDIX A.

In view of what has been said from time to time, in the body of this work, there seems to be a propriety in presenting for the consideration of the reader the substantial parts of one of the forms of marriage settlement which have, for many years, been in use in England. These have been copied from Atkinson's Forms of Conveyancing (p. 428). Though, by the changes of the law in England, as well as by the statute provisions of many of the States, the occasion for limiting the estate to trustees to preserve contingent remainders is obviated, the form, in that respect, is retained for convenient reference. So the phraseology of the English form is preserved, although much less brief and simple than that usually adopted in similar instruments in this country. The one selected is that employed where the father makes a settlement of a freehold estate in favor of a daughter and her intended husband, with provisions for children of the marriage; and one object in inserting it is to make it an opportunity for showing the application of the doctrine of *uses* in the modes of conveying lands, in raising *springing* and *shifting uses*, and in creating *powers* and providing for the execution of trusts and the like. With such notes of explanation as are appended, it is hoped it may furthermore serve to furnish hints to guide in framing a class of legal papers which have not hitherto been of frequent use in this country. "This," says Judge Kent, "requires the introduction of powers of leasing, selling, exchanging, and charging the lands, and with the reservation of a power to alter and modify the dispositions in the settlement, as exigencies may require. It is done by a general power of appointment in the first instance, or by adding to the limitations a power of revocation and new appointment. Powers are the mainspring of this machinery."[1]

[1] 4 Kent, Com. 380.

SETTLEMENT ON MARRIAGE, MADE BY THE FATHER OF THE LADY AND THE INTENDED HUSBAND.

(1) This indenture, made, etc., between A. B., [the father] of, etc., of the *first* part, C. D., daughter of said A. B., of the *second* part, E. F., [the intended husband] of, etc., of the *third* part, and J. D. and J. S., of, etc., [the trustees] of the *fourth* part: Whereas a marriage hath been agreed upon, and is intended shortly to be duly had and solemnized, between the said C. D. and E. F.; and whereas, upon the treaty for said intended marriage, it was agreed that the messuages, lands, and hereditaments hereinafter mentioned, etc., respectively, should be conveyed and settled to the uses, upon and for the trusts, interests, and purposes, and with, under, and subject to the powers, provisos, agreements, and declarations, hereinafter expressed and declared of and concerning the same: —

(2) *Now, this indenture witnesseth*, that in pursuance and performance of the said agreement on the part of the said A. B., and for the considerations aforesaid, the said A. B. hath granted, bargained, sold, aliened, released, and confirmed, and by these presents doth, etc., unto the said J. D. and J. S. and their heirs, all that, etc. (estate); to have and to hold the same messuages, lands, and hereditaments, etc., to the said J. D. and J. S., and their heirs, to the uses upon and for the trusts, intents, and purposes, and with, under, and subject to the provisos, agreements, and declarations hereinafter expressed and declared, of and concerning the same.

(1) This part includes the parties to the indenture, and the consideration upon which it is entered into. "Trustees are almost always necessary in marriage settlements; and where they are parties, powers for changing them, and clauses for their indemnity, and the reimbursing their expenses, should always be inserted in the settlement." "All persons having any estate or interest in the property to be settled should be parties to the deed, and all persons intended to be bound by the deed." "It is always proper in marriage settlements to describe the parties fully." "The marriage is alone a sufficient consideration for the settlement where it is executed before marriage, or made in pursuance of articles which were executed before the marriage." 7 Bythew. Conv. 355; 2 Sugd. Pow. 3d Am. ed. 228.

(2) This is called the *operative part* of the indenture, whereby the party, whoever he is, conveys, usually, to trustees in the nature of feoffees to use, or as here, by bargain and sale, *habendum* to the intended uses and subject to the powers and trusts prescribed by the parties. In this case, it will be perceived, the legal estate granted is a fee-simple. 7 Bythew. Conv. 354.

(3) And it is hereby agreed and declared by and between the said parties to these presents, that the grant, &c., hereinbefore contained, and hereby respectively made as aforesaid, shall operate and enure to the use of the said A. B., his heirs and assigns till the intended marriage shall be duly had and solemnized; and from and (4) immediately after the solemnization thereof, to the use of the said J. D. and J. S., and the survivor of them, and the executors and administrators of such survivor, for and during the natural life of the said C. D. (5) In trust, nevertheless, to collect, get in, and receive the rents, issues, and profits of the said messuages, lands, and hereditaments, as and when the same shall become due and payable, and to pay the same to such person or persons for such estates or interests, intents, and purposes, and in such manner, as the said C. D. shall from time to time, notwithstanding her coverture, by any writing or writings under her hand (but so as not to dispose of or affect the same by way of sale, mortgage, or otherwise, in the way of anticipation), direct or appoint; and (6) in default of such direction or appointment, to pay the same into her own hands for her sole and separate use and benefit, independently and exclusively of her said intended husband, the said E. F., and without being in any wise subject to his debts, control, interference, and engagements; and the receipt of said C. D. or of her appointees, notwithstanding her coverture, to be from time to time a sufficient discharge for the same; (7) and from and immediately after

(3) This and the following clauses contain the declarations of the uses and trusts in the indenture. *First*, to the use of the grantor and his heirs till the intended marriage of the daughter. The effect of this is, that, if the marriage never takes place, all ulterior uses fail, the use in him never shifts, and he is left, to all practical purposes, the owner of the original estate in fee, the seisin being united with the use limited to him.

(4) *Second*, upon the marriage, the use springs or shifts from the grantor to the trustees themselves, and the seisin granted to them unites with this use, creating a legal estate in them; but, being intended for the benefit of the wife, it is limited to them for her life only; and at the same time there is an active trust created in favor of the wife, whereby the legal estate is to remain in the trustees so long as the active trust is to continue.

(5) This clause defines the trusts in favor of the wife for which the estate is to be thus held, and also gives to her the power of appointing to whose benefit the estate shall be held and the rents thereof paid, with a clause, which may or may not be inserted, as the settler may choose, withholding from her the power of anticipating the rents by mortgage or otherwise. Clancey, Husband and Wife, 328–330; Jackson v. Hobhouse, 2 Meriv. 483. As to the effect of such clause, see Hill, Trust. 424.

(6) By this clause the trustees are authorized to pay over the rents to the wife without the control of the husband, or liability on account of his debts, etc.

(7) Upon the decease of the wife in the foregoing settlement, the use in the trustees ceases and shifts to the husband, and this clause limits such use to him during his life,

the decease of the said C. D., then, in case the said E. F. shall survive her, to the use of the said E. F. and his assigns for and during the term of his natural life; (8) and from and immediately after the determination of that estate by forfeiture or otherwise in his lifetime, then to the use of the said J. D. and J. S. and their heirs. In trust to support the contingent uses and estates hereinafter limited from being defeated or destroyed; and, for that purpose, to make entries and bring actions as occasion shall require, but nevertheless (9) to permit and suffer the said E. F. and his assigns, during his life, to receive and take the rents, issues, and profits of the said messuages, lands, and hereditaments to and for his and their proper use and benefit; and from and immediately after the decease of the survivor of them the said E. F. and C. D., (10) to the use of all and every the child and children of the said C. D. by the said E. F. lawfully to be begotten, who, being a son or sons, shall live to attain the age of twenty-one years, or, being a daughter or daughters, shall live to attain that age or marry, which shall first happen, their heirs and assigns as tenants in common. (11) And in case there shall

from and after her death, with a provision in case of forfeiture, and to prevent a defeat thereby of the contingent remainder to the children, for a limitation of the estate to the same trustees and their heirs, to support the contingent remainder during the life of the husband.

(8) Is the usual form in which such trust to support contingent remainders may be and formerly was created.

(9) This clause declares the trust in such case for which the trustees are to hold the estate: in this case, it is in favor of the husband or his assigns.

(10) By this clause, immediately upon the death of the husband, the use shifts from the trustees to such child or children of the marriage as the settler may prescribe: in this form, it is limited to such child or children in fee.

(11) This clause is the last of the series of limitations in the settlement by the way of shifting uses, whereby, if the husband and wife die, and no child or children of such marriage shall live to attain a vested interest in the premises, the use shifts in favor of the settler or his heirs or assigns in fee. In following the prescribed form, and confining these explanations to what is found there, it is not proposed to anticipate questions which may be raised by particular modes of expression. And yet it seems almost necessary to allude to a series of cases which have recently arisen in the English courts upon the point, whether in limitations substantially like that given above, in favor of the children of the marriage, the estate vests in each child successively as soon as born, opening to let in children subsequently born; or whether the vesting is postponed till the child attains the age of twenty-one years, or, if a daughter, is married. Other questions connected with this, as to subsequent limitations, whether they are remainders or executory devises, have also been raised, which it is not necessary to examine here. In Bromfield *v.* Crowder, 1 Bos. & P. N. S. 313, the limitation was by will to A. and B. successively for life, and, at the death of the survivor, to C., if he should attain twenty-one; but if he died before that, and D. survived him, then to D., etc. It was held that C. took a vested fee determinable upon the contingency of his dying under twenty-one years of age. This seems to be in accordance with Blanchard *v.* Blanchard, 1 Allen, 223. In

be no child or children of the said intended marriage who shall live to attain a vested interest or vested interests in the said hereditaments and premises under the provisos aforesaid, then to the use of the said A. B., his heirs and assigns forever.

(12) Provided always, and it is hereby agreed and declared

Festing *v.* Allen, 12 M. &. W. 279, the limitation was by will to J. for life, and after her death to the use of all and every the child and children of J. *who should attain the age of twenty-one years*, and their respective heirs. And for want of such issue, etc. J. married and had three children, and died leaving them all infants; and it was held, that J. had a life-estate with a contingent remainder to such of her children as should attain the age of twenty-one, which was defeated by her dying before any of them attained that age. In Riley *v.* Garnett, 3 De Gex & S. 629, the devise was to trustees for the benefit of a married woman for life; after, in trust for all her children who should attain twenty-one years, or, being daughters, should attain that age or marry, and their heirs. It was held, to give vested estates to all her children as they came into being, subject to be divested on their deaths under twenty-one, and, if daughters, unmarried. This was in accordance with the doctrine of the case of Roake *v.* Nowell, 1 Maule & S. 327. In Browne *v.* Browne, 3 Smale & G. 568, the devise to the children was to his child or children who should attain twenty-one, as tenants in common in fee; and if only one child, etc., for such child in fee. Held, that upon the tenant for life dying, leaving only one child, an infant, he took a vested fee-simple, but liable to be divested upon his dying under age. In *Re* Mid. Kent Railw. Act, Johns. Eng. Ch. 357, the limitation was substantially like that in Riley *v.* Garnett, above cited, with a like limitation as in Browne *v.* Browne, if there were only one child. It is left undecided whether the remainders were vested or contingent, after commenting upon Festing *v.* Allen, above cited, and the case of Bills *v.* Hopkinson, 5 Q. B. 223, which the Vice-Chancellor says it is extremely difficult to reconcile with it. The case of Duffield *v.* Duffield, 3 Bligh, N. S. 260, might also be referred to. But it would be extending this note to too great a length to attempt to analyze these and the other related cases, since there could be no hope of arriving at any simple and intelligible rule of general applicability. It may be sufficient to add, that the tendency of late seems to be to hold a limitation like that given in the foregoing form, as creating a vested estate in the children at the times of their birth, as they may successively be born, and to assume that such would be the construction unless varied or controlled, as in Duffield *v.* Duffield, by some peculiar form of expression in the terms creating it. There would, moreover, be an insuperable objection to limiting estates by way of the shifting of uses or execution of powers beyond the period of a life or lives in being, and twenty-one years and a fraction more, because of the rule of law prohibiting perpetuities. 1 Sugd. Pow. 3d Am. ed. 178. Thus, in the present case, the limitations were in effect to the settler in fee, unless the marriage of a daughter then living takes place, then to the daughter and husband for life, then to their children who should attain twenty-one years, in fee; and it is only in case that no child attains that age that the final limitation over to the settler in fee takes effect, bringing all these limitations clearly within the rule. But inasmuch as it is often desirable to make dispositions of the estate for the benefit of parties contemplated by the settlement, which no mere owner of a life-estate could make, nor one having an interest in a contingent remainder therein, clauses are usually inserted in these settlements creating powers of revocation and appointment to new uses by sale, lease, or otherwise, to serve the wants and necessities of families, some of which are as follow in the next clause of the above settlement.

(12) This clause creates a power in the trustees to sell part or all of the estate in fee, subject to such restriction, as to the consent of the parties interested, as the settler may see fit to impose.

between and by the said parties to these presents, that it shall and may be lawful for the said J. D. and J. S., and the survivor of them, and the executors, administrators, or assigns of such survivor, during the lives of the said E. F. and C. D., and the life of the survivor of them, and also during the minority of any son or sons, or the minority or until the marriage of any daughter or daughters, of the said intended marriage, who shall be entitled to the said messuages, lands, and hereditaments under the limitations hereinbefore contained, but with the consent in writing of the said E. F. and C. D., during their joint lives, or of the survivor of them during his or her life, or at the discretion of the said J. D. and J. S., after the decease of such survivor, to dispose of and convey, by way of absolute sale, all or any part of said messuages, lands, and other hereditaments hereinbefore, etc., and the inheritance thereof in fee-simple, to any person or persons whomsoever, for such price or prices in money as to them, the said J. D. and J. S., or the survivor of them, or the executors or administrators of such survivor, shall seem reasonable; and that (13), for the purpose of effecting such dispositions and conveyances, it shall and may be lawful to and for the said J. D. and J. S., and the survivor of them, and the executors or administrators of such survivor, with such consent and approbation as aforesaid, by any deed or deeds, instrument or instruments in writing, to be by them sealed and delivered in the presence of and to be attested by witnesses, absolutely to revoke and make void all and every or any of the uses, trusts, powers, and provisions hereinbefore limited, expressed, or declared of and concerning the same messuages, lands, and other hereditaments respectively, or any part or parts thereof; (14) and by the same or any other deed or deeds, instrument or instruments, in writing, to be executed in like manner, and with such consent, or at such discretion as aforesaid, to limit, declare, direct, or appoint any use or uses, estate or estates, trust or trusts, of the said messuages, lands, and other hereditaments, or any part or parts thereof, which it shall be thought necessary or expedient to limit, declare, direct, or appoint, in order to effectuate any such sale, disposition or conveyances aforesaid; and also (15), that upon payment of the

(13) By this clause, the form of the deed and mode of executing the power may be prescribed.

(14) This clause provides for authorizing the trustees to limit and appoint new uses or estates, or trusts of the premises, in carrying the power of sale into effect.

(15) This clause authorizes the trustees to receive the purchase-money on such sales, relieving the purchaser from liability on account of the application of the purchase-

money arising by sale of the said messuages, lands, and other hereditaments, or of any part or parts thereof, it shall and may be lawful to and for the said J. D. and J. S., and the survivor of them, and the executors or administrators of such survivor, to sign and give receipts for such money, and that such receipt shall be sufficient discharges to the person or persons to whom the same shall be given for the money, in such receipts respectively expressed or acknowledged to be received; and that such person or persons, his, her, or their heirs, executors, administrators or assigns, shall not afterwards be answerable or accountable for any loss, misapplication, or non-application of such money, or be obliged or coerced to see to the application thereof.

(16) And it is hereby decreed and declared that the said J. D. and J. S., or any future trustee or trustees of these presents, shall stand possessed of the money to arise from such sale or sales, in trust, with such consent, or at such discretion as the case may be, as aforesaid, to lay out and invest the same in the purchase of other messuages, lands, and hereditaments, either freehold or leasehold; and shall settle and assure, or cause to be settled and assured, the messuages, lands, and hereditaments so to be purchased in the names of the said J. D. and J. S., or the survivor of them, or any future trustee or trustees of these presents, to such and the same uses, upon such and the same trusts, to and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisions, conditions, agreements, and declarations, as are hereinbefore expressed and declared, of and concerning the hereditaments and premises so to be sold, or as near thereto as the deaths of parties, and other intervening accidents, will then admit of.

(17) Provided also, and it is hereby agreed and declared between and by the parties to these presents, that it shall and may be lawful to and for the said J. D. and J. S., or any future trustee or trustees of these presents, as aforesaid, during the lives of the said E. F. and C. D., and the life of the survivor of them, and also during the minority of any son or sons, or during the

money. As to the law upon this latter point, see Laussat, Fonbl. Eq. 415, and note; Field *v.* Schieffelin, 7 Johns. Ch. 150, 160.

(16) This clause provides for the expenditure and application by the trustees of the moneys arising from such sale, by purchasing other lands, etc., and the uses to which the lands thus purchased shall be limited, varying, of course, so as to accomplish the object and intent of the settler.

(17) This clause provides for making leases, by the trustees, of the premises, prescribing the mode, length of the term, and the like.

minority or until marriage of any daughter or daughters, of the said intended marriage, who shall be entitled to the said messuages, lands, and hereditaments, under the limitations hereinbefore contained, but with the consent in writing of the said E. F. and C. D. during their joint lives, and of the survivor during his or her life, and at their or his own discretion after the decease of such survivor, and by any deed or deeds, writing or writings, to be by them or him sealed and delivered in the presence of, and to be attested by, etc., to demise and lease all or any part or parts of the said messuages, lands, and hereditaments, to any person or persons, for any term or number of years absolute, not exceeding, etc., to take effect in possession, and not in reversion, or by way of future interest, so that there be reserved on every such demise or lease the best or most improved yearly rent, to be payable during the continuance thereof, to be incidental to the immediate reversion of the hereditaments so to be demised or leased, that can or may be reasonably had or gotten for the same, so that there be contained in every such lease all clauses and provisions usual and proper in leases of the like nature.

(18) Provided also, and it is hereby agreed and declared between and by the parties hereto, that it shall and may be lawful to and for the said J. D. and J. S., or the survivor of them, or for any future trustee or trustees for the time being of these presents, with such consent or at such discretion as aforesaid, by any deed or deeds, instrument or instruments in writing, either during the life of the said E. F. and C. D., or the survivor of them, and the minority of any son or sons, or during the minority or until the marriage of any daughter or daughters, of the said intended marriage as aforesaid, by sale, mortgage, or other disposition of the whole or any part of the said messuages, lands, and hereditaments, to levy and raise any sum or sums of money not exceeding —— part of the principal share or shares of any such child or children, and to give receipts valid and effectual to the person advancing the same, who shall not be answerable for the application thereof, and do and shall apply the money so to be raised in or towards the preferment or advancement in the world of the child or children for whom the same shall be respectively raised as aforesaid.

(18) This clause authorizes the trustees to raise moneys by sale or mortgage of the premises, for the benefit of any of the children, etc., exonerating the person advancing the money from responsibility as to its application.

(19) Provided also, and it is hereby agreed and declared by and between the said parties to these presents, that if the trustees hereby appointed, or to be appointed as hereinafter mentioned, or either of them, shall die or decline, or become incapable to act in the execution of the trusts hereby created, then, and in such case, and so often as the same shall happen, it shall be lawful to and for the said E. F. and C. D. during their joint lives, and for the survivor of them during his or her life, and after the decease of the survivor for the surviving or continuing trustee, his executors or administrators, by any deed or writing under their or her hands and seals, or hand and seal, and to be attested, etc., to nominate, substitute, and appoint any person or persons to be a trustee or trustees in the stead of them or either of them so dying, declining, or becoming incapable to act as aforesaid; and that thereupon all the trust-estates, moneys, and premises, which shall be then vested in the trustees or trustee so dying, declining, or becoming incapable to act, shall be with all convenient speed conveyed, assigned, and transferred unto such new trustees or trustee, either jointly or solely, as occasion shall require, to the same uses and upon and for the same trusts hereinbefore declared, of and concerning the same trust-estates, moneys, premises, or such of them as shall be then subsisting or capable of taking effect; and that every such new trustee shall have the same powers, authorities, and discretion, in all respects, in the execution of the trusts hereby created, as if he or they had been originally nominated a trustee or trustees in and by these presents.

(20) Provided also, and it is hereby further agreed and de-

(19) This is an important clause, creating a power for supplying trustees upon the death or resignation, etc., of those named in the settlement, prescribing by whom and in what form and manner this may be executed, and providing for a conveyance and assignment of the trust-estates to such new trustee or trustees. The language of a writer of authority upon the subject is, "Every well-drawn deed of settlement and will, creating trusts, which may, by possibility, endure beyond a very short period, contains powers enabling any of the trustees for the time being to relinquish the trust, as well as provisions for supplying by fresh nominations the vacancies to be occasioned by the resignation or the death or incapacity of any trustee." (Hill, Trust. 176.) "In framing these powers, the greatest care should be taken to provide for every possible contingency in which a change or new appointment of trustees may become necessary or desirable, so as to obviate the expense and trouble of an application to the court of chancery." (Ibid.) "The instrument of appointment will not, of itself, vest the estate in the trust-property in the newly appointed trustee: for that purpose, it must be accompanied by a conveyance or assignment of the property to the new trustee, or to him, jointly, with the surviving or continuing trustee, if any." (Ib. 186.)

(20) This is a clause exempting each trustee from responsibility, except for his own fault or for what he actually receives: though, for form, he may sign receipts, in the execution of the trusts.

clared between and by the parties to these presents, that the trustees hereby nominated and appointed, or to be nominated and appointed by virtue of the proviso hereinbefore contained, and each and every of them, shall be charged and chargeable, respectively, only for such moneys as he or they shall respectively actually receive by virtue of the trusts hereby in them reposed, notwithstanding his or their or any of their giving or signing, or joining in giving or signing, any receipt or receipts for the sake of conformity; and any one or more of them shall not be answerable or accountable, etc., for any loss or damage which may happen in the execution of the aforesaid trusts, or in relation thereunto, unless the same shall happen by or through their own wilful default respectively.

(21) Then follows a clause providing for a reimbursement of the trustee's costs, charges, etc., incurred and expended in executing the trust.

(22) Then a clause, wherein the father covenants that he has full power to limit, appoint, grant, etc., the premises to the uses, etc., expressed, and for further assurance, etc.; closing with the usual *in testimonium* clause. See also a form in several respects like the foregoing, in 7 Bythewood on Conveyancing, 451, 497.

Stripped of its redundancy of verbiage, and reduced to its simple elements, the foregoing settlement amounts to this: namely, the estate is thereby limited, 1st, to the settler himself, the seisin through the trustees being executed to the use in him; 2d, by shifting the use to the trustees themselves, and the seisin is executed to the use in them, but, the gift being intended to be to the use of the daughter, they become seised as trustees proper during her life; 3d, at her death, the trust ceasing, the use shifts to the husband for life, and the seisin is executed to the use in him; 4th, a remainder in case of forfeiting his life-estate is limited to the same trustees, as trustees to preserve contingent remainders, during the husband's life; 5th, at his death, the use shifts again to the child or children of the marriage, if any, and the seisin is executed to the use in them, in fee, if they arrive at the age of twenty-one years, or otherwise acquire vested estates in possession; and 6th, the use shifts again to the settler, if no

(21, 22) State the usual clauses providing for reimbursing trustees for their costs, etc., and the ordinary covenants for title on the part of the settler. It may be added, that in this country, inasmuch as a trustee may claim compensation for his services as such, it would seem that the twenty-first in the foregoing form might be omitted. (1 Greenl. Cruise, Dig. 456, note.)

child takes the fee, and the seisin is executed in him in fee. So far, this settlement works a succession of shifting uses. In the next place, it raises and creates the following powers in the trustees named, and to be by them executed: namely, 1st, to sell and pass the estate in fee, and limit and prescribe new uses; 2d, to collect and reinvest the proceeds of such sale in new estates; 3d, to make leases of the estate; 4th, to raise money for minor children by sale or mortgage of the estate; and 5th, to appoint new trustees with similar powers, and with power to convey the estate to them. And such is the ductile and plastic character of uses when applied to conveyances, that, in carrying out the foregoing settlement, the same persons named as trustees are made to play successively the several parts of feoffees to use, active trustees, trustees to preserve contingent remainders, and donees of powers of sale, of revocation and appointment, of leasing, and of creating new trustees with similar and equal powers with their own.

APPENDIX B.[1]

Magna Charta, 9 Henry III. c. 7, A. D. 1225.

A widow, after the death of her husband, incontinent, and without any difficulty, shall have her marriage and her inheritance, and shall give nothing for her dower, or her marriage, or her inheritance, which her husband and she held the day of the death of her husband; and she shall tarry in the chief house of her husband by forty days after the death of her husband, within which days her dower shall be assigned her (if it were not assigned her before), or that the house be a castle; and if she depart from the castle, then a competent house shall be forthwith provided for her, in the which she may honestly dwell until her dower be to her assigned, as it is aforesaid; and she shall have in the mean time her reasonable estovers of the common; and for her dower shall be assigned unto her the third part of all the lands of her husband, which were his during coverture, except she were endowed of less at the church-door.

[1] For the convenience of the reader, portions of some of the more important early statutes, referred to in the foregoing work, have been added by the way of Appendix thereto; they being such as are understood as forming a part of the common law of most, if not all, of the States.

APPENDIX C.

STATUTE OF MARLEBERGE, 52 Henry III. c. 23, A. D. 1267.

Also fermors, during their terms, shall not make waste, sale, nor exile, of house, woods, and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously.

APPENDIX D.

STATUTE OF GLOUCESTER, 6 Edward I. c. 5, A. D. 1278.

It is provided also, that a man from henceforth shall have a writ of waste in the chancery against him that holdeth by law of England, or otherwise for term of life, or for term of years, or a woman in dower. And he which shall be attainted of waste shall *leese* the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at. And for waste made in the time of wardship, it shall be done as is contained in the Great Charter. And where it is contained in the Great Charter that he which did waste during the custody shall *leese* the wardship, it is agreed that he shall recompense the heir his damages for the waste, if so be that the wardship lost do not amount to the value of the damages before the age of the heir of the same wardship.

APPENDIX E.

STATUTE OF WESTMINSTER 2d, 13 Edward I. c. 1, A. D. 1285.

De donis conditionalibus.

1. First, concerning lands that many times are given upon condition, that is, to wit, where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with such condition expressed, that, if the same man and his wife die without heirs of their bodies between

them begotten, the land so given shall revert to the giver or his heir. In case also where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expressed in the deed of gift, which is this, that, if the husband and wife die without heir of their bodies begotten, the land so given shall revert to the giver or his heir. In case also where one giveth land to another, and the heirs of his body issuing; it seemed very hard, and yet seemeth to the givers and their heirs, that, their will being expressed in the gift, was not heretofore, nor yet is, observed. In all the cases aforesaid, after issue begotten and born between them (to whom the lands were given under such condition), heretofore such feoffees had power to alien the land so given, and to disherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift. And further, when the issue of such feoffee is failing, the land so given ought to return to the giver or his heir, by form of the gift expressed in the deed, though the issue (if any were) had died; yet, by the deed and feoffment of them (to whom the land was so given upon condition), the donors have heretofore been barred of their reversion, which was directly repugnant to the form of the gift.

2. Wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained that the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed; so that they to whom the land was given under such condition shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver, or his heirs, if issue fail (whereas there is no issue at all), or if any issue be, and fail by death, or heir of the body of such issue failing. Neither shall the second husband of any such woman, from henceforth, have anything in the land so given upon condition, after the death of his wife, by the law of England, nor the issue of the second husband and wife shall succeed in the inheritance, but immediately after the death of the husband and wife (to whom the land was so given) it shall come to their issue, or return unto the giver, or his heir, as before is said. And forasmuch as in a new case new remedy must be provided, this manner of writs shall be granted to the party that will purchase it.

APPENDIX F.

Statute of Westminster 3d, 18 Edward I. c. 1, 2, 3, A. D. 1290.

Quia Emptores.

Chap. 1. Forasmuch as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors, and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands and tenements belonging to their fees; which thing seemed very hard and extreme unto those lords and other great men, and moreover in this case manifest disinheritance: Our lord the king, in his parliament at Westminster, after Easter, the eighteenth year of his reign, that is to wit, in the quinzime of St. John Baptist, at the instance of the great men of the realm, granted, provided, and ordained, that from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee by such service and customs as his feoffor held before.

Chap. 2. And if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the services for so much as pertaineth, or ought to pertain, to the said chief lord for the same parcel, according to the quantity of the land or tenement so sold. And so in this case the same part of the service shall remain to the lord, to be taken by the hands of the feoffee, for the which he ought to be attendant and answerable to the same chief lord, according to the quantity of the land or tenement sold for the parcel of the service so due.

Chap. 3. And it is to be understood, that by the said sales or purchases of lands or tenements, or any parcels of them, such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy nor craft, contrary to the form of the statute made thereupon of late, and it is to wit, that this statute extendeth but only to lands holden in fee-simple.

APPENDIX G.

Statute 32 Henry VIII. c. 34, A. D. 1540.

Concerning Grantees of Reversions to take Advantage of the Conditions to be performed by the Lessees.

1. Be it therefore enacted by the king our sovereign lord, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, that as well all and every person and persons, and bodies politic, their heirs, successors, and assigns, which have or shall have any gift or grant of our said sovereign lord by his letters-patent of any lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, or of any reversion or reversions of the same, which did belong or appertain to any of the said monasteries, and other religious and ecclesiastical houses, dissolved, suppressed, relinquished, forfeited, or by any other means come to the king's hands since the said fourth day of February, the seven and twentieth year of his most noble reign, or which at any time heretofore did belong or appertain to any other person or persons, and after came to the hands of our said sovereign lord, as also all other persons being grantees or assignees to or by our said sovereign lord the king, or to or by any other person or persons than the king's highness, and the heirs, executors, successors, and assigns of every of them, shall and may have and enjoy like advantages against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing of waste or other forfeiture; and also shall and may have and enjoy all and every such like, and the same advantage, benefit, and remedies, by action only, for not performing of other conditions, covenants, or agreements contained and expressed in the indentures of their said leases, demises, or grants, against all and every the said lessees and farmers and grantees, their executors, administrators, and assigns, as the said lessors or grantors themselves, or their heirs or successors, ought, should or might have had and enjoyed at any time or times, in like manner and form as if the reversion of such lands, tenements, or hereditaments had not come to the hands of our said sovereign lord, or as our said sovereign lord, his heirs and successors, should or might have had and enjoyed in certain cases, by virtue of the

act made at the first session of this present parliament, if no such grant by letters-patents had been made by his highness.

2. Moreover, be it enacted by authority aforesaid, that all farmers, lessees, and grantees of lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, for term of years, life or lives, their executors, administrators, and assigns, shall and may have like action, advantage and remedy against all and every person and persons and bodies politic, their heirs, successors, and assigns, which have or shall have any gift or grant of the king our sovereign lord, or of any other person or persons, of the reversion of the same manors, lands, tenements, and other hereditaments so letten, or any parcel thereof, for any condition, covenant, or agreement contained or expressed in the indentures of their lease and leases, as the same lessees, or any of them, might and should have had against the said lessors and grantors, their heirs and successors; all benefits and advantages of recoveries in value by reason of any warranty in deed or in law by voucher or otherwise only excepted.

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